S. HRG. 100-919

ANTITRUST IMPLICATIONS OF THE RECENT NFL TELEVISION CONTRACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. Res. 291

A RESOLUTION ON THE ANTITRUST IMPLICATIONS OF THE RECENT NFL TELEVISION CONTRACT

OCTOBER 6, 1987

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SENATE RESOLUTION 291 AND THE ANTITRUST IMPLICATIONS OF THE RECENT NFL TELEVISION CONTRACT

TUESDAY, OCTOBER 6, 1987

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES
AND BUSINESS RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:00 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum, Chairman, presiding.

Present: Senators Metzenbaum, Specter, and Hatch.

Senator METZENBAUM. This hearing will come to order.

In our hearing today, we will hear from three witnesses: Pete Rozelle, Commissioner of the National Football League; William Grimes, President and Chief Executive Officer of ESPN; Stephen Ross, Assistant Professor at the University of Illinois, College of Law, and one whom I know particularly is someone of an expert in this area since he was formerly on my staff. I thought that ought to just be made clear, but obviously he no longer is on my staff.

In the last five years, the Senate has returned time and time again to examine issues involving professional sports. Quite frankly, some may wonder why this Committee is once again looking at a sports question.

The answer is that this is not just a sports question. It is a question of what Congress meant when it passed antitrust legislation in 1961 permitting the NFL to negotiate jointly a television contract. It is a question of whether or not the American people are benefiting from the NFL-cable contract. Finally, it is a question of whether or not the free enterprise system is going to be allowed to operate in the arena of professional sports.

I am concerned, frankly, that the American public may very well be disserved by any agreement among members of the National Football League that minimizes the number of fans that are able to view professional football games. I am also concerned that programming with such strong public appeal as professional football may shift to cable television and require the public to pay a premium to see it.

While owners of broadcasting rights are free to make such a decision in many cases, the antitrust laws may apply if a group of competitors, such as the NFL teams, decide to do so as a group.

We know that the NFL-ESPN contract will put $153 million in the pockets of the club owners. The question I have today is: Will that contract increase viewership, or will it instead limit the number of games available for viewing by those who cannot afford to subscribe to ESPN?

Will it be in the interest of the viewing public, or is the first step in an effort to reduce competition and make the public pay more?

I urged the Department of Justice and the Federal Trade Commission to investigate this matter and to ask these same questions. The public interest demands no less.

The Senator seated to my left has been one who is particularly interested in having these hearings go forward, and as an accommodation to him and because of the concern of the Chair, they are going forward this morning. I must say to my colleague seated on my left that I can hardly think of a worse day for us to have picked to hold these hearings. Not only are the players and the NFL engaged in a major confrontation, but the Senate Judiciary Committee, on which both he and I serve, will be dealing with the Bork nomination today at 2:00 o'clock. The Chair will probably have to leave early and ask the Senator from Pennsylvania to preside in order that I might go to a meeting in order to discuss some issues having to do with that subject.

[The statement of Senator Thurmond follows:]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS, SENATE JUDICIARY COMMITTEE, REFERENCE THE ANTITRUST ASPECTS OF THE NFL-ESPN CONTRACT, 226 DIRKSEN SENATE OFFICE BUILDING. TUESDAY, OCTOBER 6, 1987, 10:00 A.M.

MR. CHAIRMAN:

TODAY'S HEARING WILL EXAMINE WHETHER THE CONTRACT ENTERED INTO BETWEEN THE NATIONAL FOOTBALL LEAGUE AND THE ESPN CABLE NETWORK, IN ANY WAY VIOLATES THE ANTITRUST LAWS. ONE ASPECT OF THIS QUESTION IS WHETHER THE CONTRACT IS OUTSIDE THE STATUTORY ANTITRUST EXEMPTION APPLICABLE TO THE "SPONSORED TELECASTING" OF PROFESSIONAL FOOTBALL GAMES. I HAVE BEEN TOLD THAT THERE IS NO EASY ANSWER TO THESE QUESTIONS, AND THEREFORE I LOOK FORWARD TO THE TESTIMONY OF THE WITNESSES HERE TODAY.

MY UNDERSTANDING OF THE NFL/ESPN CONTRACT IS THAT IT PROVIDES FOR THE TELECASTING BY ESPN OF APPROXIMATELY EIGHT REGULAR SEASON GAMES, SEVERAL PRE-SEASON GAMES, AND THE PRO-BOWL GAME. IF THESE GAMES HAD BEEN TELECAST BY THE REGULAR BROADCAST NETWORKS, THE NEGOTIATION OF THE TELEVISION RIGHTS WOULD BE EXEMPT FROM THE ANTITRUST LAWS PURSUANT TO LEGISLATION ENACTED IN 1961 COVERING THE "SPONSORED TELECASTING" OF PROFESSIONAL FOOTBALL GAMES. SINCE IT IS NOT CLEAR WHETHER "SPONSORED TELECASTING" COVERS CABLE TELEVISION, IT IS ALSO NOT CLEAR WHETHER THE ANTITRUST EXEMPTION COVERS THE ESPN CONTRACT.

I THANK THE WITNESSES FOR THEIR TIME AND EFFORT IN APPEARING BEFORE US TODAY, AND I LOOK FORWARD TO THEIR TESTIMONY.

Senator METZENBAUM. Senator Specter, do you have an opening statement?

Senator SPECTER. Yes, thank you very much, Mr. Chairman.

At the outset, I want to thank you, Mr. Chairman, for scheduling these hearings. I quite agree with you that they come on a day where there is a lot of competition, but I believe that the subject matter is very important. And if you caught the three networks at 7:00 a.m. this morning at the top of the news, I believe the NFL was at the top of two of the news shows, and the confirmation of Judge Bork was only at the top of one of the news shows.

I personally do not think there is any subject more important in America today than the issue of having the Supreme Court of the United States at full strength, and there is enormous concern about Judge Bork. And wherever I go, as I know, Mr. Chairman, wherever you go, we are questioned about what is going to happen on Judge Bork. But it may be that notwithstanding the enormous public interest over Judge Bork, it is rivaled by the enormous public interest on the National Football League.

Senator METZENBAUM. The Metzenbaum poll says it is 51 percent for the NFL players' dispute and 49 percent on the Bork issue as far as the American people are concerned. That is my own private poll, Senator.

Senator SPECTER. Well, since Senator Metzenbaum has never been wrong yet, I will abandon that subject and move on to another topic.

These hearings have been in the making for a long time, and I would like to at this point put in the record my letter of March 17 to Commissioner Rozelle, expressing my concern about the ESPN contract because of the worry that I have that professional football may well be on its way to a pay television status.

[The letter of Senator Specter follows:]

ARLEN SPECTER
PENNSYLVANIA

COMMITTEES
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS
INTELLIGENCE

United States Senate
WASHINGTON, DC 20510

March 17, 1987

Commissioner Pete Rozelle
The National Football League
410 Park Avenue
New York, NY 10022

Dear Commissioner Rozelle:

I am writing to express my concern over the reports that the N.F.L. has entered into an agreement with a cable network, E.S.P.N., whereby a number of League games will be shown on cable television.

It was my clear understanding, based on my conversations with you, Jay Moyer and Paul Tagliabue in 1985, that the League did not intend to move to cable television in the foreseeable future. Based on my study and analysis at that time, I had concluded that the 1961 sports telecasting statute (15 U.S.C. §1291) did not provide the League with antitrust immunity as to sharing revenues from cable television. As you know, I have long been concerned that the N.F.L. not move away from free, broadcast television toward cable networks, to whom fans would have to pay fees in order to watch N.F.L. games. On March 6, 1985, at a hearing before the Senate Judiciary Committee, I expressed to you my concern that a revenue sharing provision in Senator DeConcini's bill, S.298, might broaden the antitrust immunity in the 1961 Act to include League-wide sharing of cable revenues. My question to you, and your response, were as follows:

> "Senator Specter: If the exemption that Senator DeConcini is proposing is adopted, is there any latitude that the N.F.L. will be able to put into effect pay television?
>
> Mr. Rozelle: It does not authorize or enable us to go into pay television at all."

See Hearings, Professional Sports Antitrust Immunity (Sen. Hrg. 99-496), at p. 158.

It would appear to me, therefore, that if the N.F.L. teams intend to share revenues from the E.S.P.N. cable contract, they do so fully subject to the antitrust laws. It also appears to me that, if the League intends to enter into telecasting agreements other than with

free, broadcast television networks, it would be appropriate for Congress to reconsider the whole issue of the League's limited antitrust immunity.

I would appreciate it if you would provide me additional information regarding the League's decision to move some of its telecasting package to a pay/cable network, and a clarification of the League's view as to whether sharing of cable revenues is in any way immunized by the 1961 Act.

Thank you for your consideration of this matter.

My best.

Sincerely,

Arlen Specter

AS:nmb

Senator SPECTER. The ESPN contract is the first occasion where there is some professional football on television which involves payments by the public, because ESPN is on cable and to get ESPN you have to pay for it. The concern that I have, flatly stated, that I expressed to Commissioner Rozelle back on March 17, 1987, is that this may be the start of making professional football a pay item for the American public. And I think that would be very bad, a departure from the existing practice. I think it might well violate the antitrust laws, and I know it would violate commitments which have been made by the NFL to this Committee.

Back in 1985, on March the 6th, I had asked Commissioner Rozelle a question about some pending legislation saying, "If the exemption that Senator DeConcini is proposing is adopted, is there any latitude that the NFL will be able to put into effect pay television?" Mr. Rozelle responded, "It does not authorize or enable us to go into pay television at all." That has been the position of the league, and I want to put that forward at the outset as a matter of fairness, because the league has steadfastly contended that they are not going to go to pay television.

At the same time, I am aware of Commissioner Rozelle's commitment back in 1961 that the NFL would go to only one television network, and the fact is the NFL has gone to three television networks. And I understand the business practices of the professional football league and the big business which is involved here. But just as the NFL can change its mind on moving from one network to three networks, I am concerned that the NFL could change its mind about going to pay television. And as I say, it seems to me that this ESPN contract is a foot in the door.

It is for that reason that I introduced Senate Resolution 291 which calls upon the Antitrust Division of the Department of Justice to make a study to determine if there is an antitrust violation in effect at the present time by this ESPN arrangement. As I view the 1961 legislation, it does not authorize sharing of revenues from cable television, but only authorizes the sharing of revenues from public television.

The FTC is currently conducting an inquiry, and I am glad Senator Metzenbaum, the Chairman, has joined in my request to the Justice Department to conduct this inquiry.

Now, I am not saying that there is a violation of the antitrust laws today on the current arrangement, but I am saying that there is a distinct possibility that it might exist. There is not necessarily a violation of the antitrust laws to be a monopoly, and the NFL is a monopoly. But it does violate the antitrust laws for a monopolist to use monopoly powers in an improper way. And impropriety has been defined as reducing output and increasing prices. That is a classic example of abuse of monopoly power. Moving NFL games to cable may constitute such an output reduction and prices increases. Prices increase from no price on free television to the cost of cable service, and output decreases, by definition, when fewer people will watch cable TV than a product that is now free as a direct result of the NFL decision.

One final comment before closing, and that is the shift in NFL policy this weekend on the television of NFL games, which I think shows the tremendous impact of television on the National Foot-

ball League. The NFL has had a policy of blacking out television in local markets, and they permit television in local markets if there is a sellout. Now, the NFL has taken a different position saying that it will permit local television if it predicts that there would have been a sellout but for the strike, which is a prophecy that I do not think is necessarily realistic. And I think what it underscores is that the NFL really depends upon television as the main source of its revenue. The American people, I think, are entitled to the protection that the antitrust laws can give them to see to it that television football is not pay television to the extent that the laws mandate that.

That is why I think these hearings are so important, and I regret that they come at a time when the NFL personnel are so heavily engaged otherwise and that the Senate Judiciary Committee is so heavily engaged otherwise. But I think they are important hearings, and I thank the Chair.

Senator METZENBAUM. Thank you, Senator Specter.

[Copy of Senate Resolution 291 follows:]

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Senate

TUESDAY, SEPTEMBER 29, 1987

(Legislative day of Friday, September 25, 1987)

SENATE RESOLUTION 201—RELATING TO A REPORT ON NATIONAL FOOTBALL LEAGUE TELECASTING

Mr. SPECTER submitted the following resolution; which was referred to the Committee on the Judiciary:

S. RES. 201

Resolved, That it is the sense of the Senate that the Antitrust Division of the Department of Justice should study and report to the Congress (1) the implications of new technology, specifically cable television and pay-per-view television services, on the application of existing antitrust laws to the telecasting practices of the National Football League; and (2) the effect on the antitrust status of current National Football League telecasting practices of the merger of the League's cable television partner with one of the major broadcast networks. Unless its study results in the initiation of a formal investigation, the Antitrust Division shall make its report to Congress no later than 180 days from the approval of this resolution. The report should include a statement of the Division's antitrust enforcement plans with respect to National Football League telecasting practices.

Mr. SPECTER. Mr. President, I am submitting a resolution calling upon the Department of Justice's Antitrust Division to undertake a study of, and prepare for Congress a report on, the telecasting practices of the National Football League.

The Senate's interest in the status of the NFL under the antitrust laws is not new. In 1961, at the request of the NFL, Congress enacted the Sports Broadcasting Act (15 U.S.C. §§ 1291-95), which granted antitrust immunity to the NFL's pooling of revenues from sponsored television broadcasts. This permitted the NFL to enter into a series of leaguewide network television contracts. In 1985, each of the NFL's 28 teams earned $18 million from such contracts.

In 1966, 5 years after the Sports Broadcasting Act, Congress provided additional antitrust immunity to the NFL, in order to permit its merger with the AFL, the only competing professional football league at that time. More recently—in the 99th and 100th Congresses—a number of bills have been introduced which proposed additional grants of antitrust immunity to the NFL. Extensive hearings before the Commerce and Judiciary Committees considered proposals to exempt from the antitrust laws NFL agreements or rules regarding relocation of franchises, selection of owners, termination of owners, or sharing of revenues of any type.

At no time since the original grant of limited immunity 26 years ago, however, has the Department of Justice reviewed the NFL's telecasting practices to determine whether they are in compliance with the law. Since the act's enactment, there have been dramatic changes in the nature of telecommunications and in the NFL's telecasting practices. Contrary to the expectations of both Congress and the NFL in 1961, the league has contracted with more than one major television network at a time. Indeed, for much of the period since the AFL-NFL merger was consummated, the NFL has had contracts with all three major networks at the same time. This year, the NFL has entered into its first major contract with a cable television network. Cable television, of course, was not within the contemplation of Congress in 1961, and the extent to which this new medium is implicated by the 1961 act is not clear. To complicate the matter further, ESPN—the cable network with whom the NFL has contracted—is itself owned by ABC, one of the major broadcast networks, and the Federal Trade Commission reportedly is investigating possible irregularities with respect to bidding for NFL television contracts.

The resolution I am submitting would direct the Antitrust Division to study and report to Congress: First, the implications of new technology—specifically cable television and "pay-per-view" services—on the application of existing antitrust laws to the NFL's telecasting practices; and second, the effect (on the lawfulness of the NFL's practices) of the merger of the league's cable television partner with one of the major broadcast networks. The Department of Justice would include in its report a statement of its antitrust enforcement plans with respect to NFL telecasting practices.

Mr. President, I long have been concerned about the possibility that the NFL might remove a portion of its televised games from free broadcast television, available to the public at no charge, and offer them instead only to fans who can afford to pay—whether for cable service or on a "pay-per-view" basis. My own view is that the 1961 act does not immunize the NFL's sharing of revenues from its ESPN, or any other, cable television contract.

At the time of the 1961 act, Congress already was concerned about the public interest in keeping NFL telecasts on free broadcast television. The committee reports referred specifically to "the public interest in viewing professional league sports," and the act limited its immunity grant to shared revenues from "sponsored telecasting." "Sponsored telecasting" was a term of art which, in my view, meant free network television. Cable television was not yet on the scene; the competing forms of telecasting—closed circuit and subscription television—plainly were not covered by the act, as the committee reports make clear. Had cable television and pay-per-view television been specifically considered by Congress, I believe they too would have been enumerated in the reports as illustrations of media which do not constitute "sponsored telecasting" and therefore do not fall within the act. I think we need to know the Department of Justice's view, however, and that, of course, is why I am offering this resolution. Finding that the NFL's sharing of cable revenues is not immunized by the 1961 act would not necessarily mean that it violates the antitrust laws. Rather, it simply would mean that the practices are subject to those laws, like virtually every other business practice in this country.

The NFL has emphasized to me that the ESPN contract does not limit the availability of NFL games on free television; and that the NFL has no intention of ever moving playoff games or the Superbowl to a nonfree format. Let me explain why I recommend less than complete confidence in the NFL's professions of intent. In 1961, when NFL Commissioner Rozelle was testifying before congressional committees in support of an antitrust exemption, concern was expressed about the possibility of the NFL "tying up" more than one of the major broadcast television networks with an immunized television contract. "Put your minds at ease," Commissioner Rozelle in effect assured Congress. Using more than one network would be "just what we are trying to get away from," Commissioner Rozelle told one committee. "If this legislation is passed," the commissioner testified, "there is no intention on our part of using more than one network." As we all now know, the NFL shortly thereafter contracted with all three major networks at the same time, and presently has a contract with a cable network owned by one of the major broadcast networks.

While I was not in Congress in 1961, I have personal experience with more recent hard and fast assurances by the NFL with respect to its intentions. In 1983, in the aftermath of the relocation of two NFL franchises and the threatened relocation of others, a number of my colleagues and I worked in great detail on a proposal to stabilize professional football. At that time, I had a number of exchanges, both public and private, with Commissioner Rozelle and his representatives, and I repeatedly expressed my concerns about the NFL moving some of its telecasts to cable television in the future. "Put your mind at ease," the NFL in effect assured me. Specifically, I was told that the NFL had absolutely no intention of telecasting any of its games on cable television or any other nonfree format. Earlier this year, the NFL signed its contract with ESPN, which provides for numerous games to be televised on cable.

Mr. President, no one could have less standing than the NFL to complain that inquiries like those I am proposing are inappropriate government meddling in private enterprise. Let one thing be clear—the NFL repeatedly has come to Congress for relief from the laws that govern private enterprises. In 1961 and 1966, the NFL sought and obtained the only two antitrust exemptions that Congress ever has granted in the field of professional sports. And as recently as the 99th Congress, the NFL and its lobbyists again urged Congress to exempt certain NFL practices from the laws which govern other businesses in our country. The resolution I am offering neither proposes changes in the law nor reaches conclusions about the legality of NFL telecasting practices. It merely directs the Department of Justice—which has the expertise, authority and responsibility to ensure that the antitrust laws are properly enforced and that exemptions from them are properly interpreted—to study certain issues and report back to Congress. Only then can we be fully informed as we consider whether the public interest demands additional legislation, and I hardly see how anyone can object to our soliciting the Antitrust Division's views.

Accordingly, I urge my colleagues to support this resolution.

Senator METZENBAUM. Senator Hatch.

Senator HATCH. Thank you, Senator Metzenbaum.

Mr. Chairman, the National Football League has had its share of attention over the last few weeks, and I really appreciate having the Commissioner here at a time when I know that he has about all he can handle on his plate and has been able to set these matters aside to appear for this particular hearing.

In 1961, Congress granted the National Football League an antitrust exemption to permit joint negotiations for broadcast contracts. Thus, teams in small media markets could compete economically with teams in major media cities. Fans profit from this arrangement because more games are put on the air.

Today, we are inquiring into the implications of that exemption in light of the NFL's arrangement to telecast some games via the cable systems. The legislative vehicle for this is S. Res. 291, and that requests the Justice Department, as Senator Specter has said, to examine the antitrust implications of new broadcast technologies, and in particular for professional football.

Now, this raises a question in my mind which I hope to answer in this hearing. New broadcast technologies do not affect football alone. As we all know, other sports, indeed, all other forms of television programming, are now broadcast on cable. Moreover, the other professional sports leagues rely on the same 1961 antitrust exemption for their telecasting practices. Thus, I wonder why S. Res. 291 focuses only on football and the NFL.

Now, this question becomes particularly relevant when we reflect on two central facts. The NFL currently reaches more viewers per game than any other sports league, and the NFL currently has far fewer games on cable than does any other professional or major collegiate sport. Thus, I once again wonder why S. Res. 291 suggests that only football poses some kind of antitrust or public interest concern.

Now, I hope this hearing will explain the reason for the narrow focus of this resolution. We will all certainly agree that the objective of the sports telecasting antitrust exemption is in the long run to benefit the fans out there. In this connection, it seems that in many parts of our country cable television does provide an excellent alternative to regular national programming. Thus, I am going to be interested to learn in this hearing whether a Thursday evening or Sunday evening cable package might attract more viewers than would otherwise enjoy a professional football game.

In any event, as long as all networks are free to compete for the NFL's product, and as long as fans have the access to the games, it seems to me that the NFL, and other sports, for that matter, should feel free to package its products according to your desires. And so with these questions in mind, I look forward to the hearings. I look forward to hearing from you, Mr. Commissioner, and others as well. I appreciate the enjoyment that your league does bring to American fans, and my family included, all over America. We look forward to hearing from you today.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Hatch.

Mr. Rozelle, we will be very happy to have you come to the table. Do you want to bring Mr. Modell with you as well?

We are happy to welcome you, Commissioner, and Arthur Modell, owner of the Cleveland Browns in my own community.

TESTIMONY OF PETE ROZELLE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE, NEW YORK, NY., ACCOMPANIED BY ARTHUR B. MODELL, PRESIDENT, THE CLEVELAND BROWNS; AND PAUL J. TAGLIABUE, COVINGTON & BURLING, COUNSEL TO NFL

Mr. ROZELLE. Yes. Mr. Modell is President of the Cleveland Browns but also chairman of the league's Broadcast Committee. I thought he might be helpful.

Senator METZENBAUM. Mr. Rozelle, as I indicated to you before the hearing, I think for us to have you before this hearing and not inquire of you as to why you as the Commissioner have not been heard from in connection with some effort to settle the strike between the players and the NFL, would be surprising to the many people in this country that are asking that question. I wonder if you would be good enough to tell us why you as the Commissioner have not seen fit to move in and at least attempt to mediate the issue.

Mr. ROZELLE. I have had meetings with the President of the Players' Association, Gene Upshaw, and phone conversations. I have attempted to stay close to the situation, of course, on the owners' Management Council side. There has been a very, very strong disagreement on several issues that have inhibited the negotiating process. I am pleased now that I think that perhaps certain pressures are involved on both sides, and I understand they are going to be meeting promptly to get back into negotiating. I think it is unfortunate they could not have accomplished more back in May, June and July, but it was all thrust at once when the season came on us.

Senator METZENBAUM. Well, I might say I think that all of us are pleased to know that management and players are going back to the negotiating table. I never heard of a strike that was settled without direct negotiations, oftentimes through some mediator—whether it is from the U.S. Mediation and Conciliation Service or someone else. It probably cannot be the Commissioner because I gather the Commissioner is considered to be part of management in this instance. I am not sure that is a fair description of you, but I gather from your comment that it appears that way.

The American people have a strong interest in this issue. They do not have an ownership right, but they feel they have some type of right in professional football. And I think the sooner the matter gets resolved and the parties themselves meet together and resolve it, I think the happier the American people will be. I think it will be one less issue to be on the top of the news in the nightly news every night.

We will be glad to hear from you, Mr. Rozelle. Do you want to introduce this gentleman?

Mr. ROZELLE. Yes. This is Mr. Paul Tagliabue, Covington & Burling, our counsel.

Senator METZENBAUM. Happy to have you with us, sir.

It is the practice of our Committee to swear the witnesses. I do not know that it is necessary in your case, but I think if you start to make exceptions, then you make exceptions all the way down the line.

So if you would be good enough to stand, please. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ROZELLE. I do.

Senator METZENBAUM. I gather, Art, you will not be testifying.

Mr. MODELL. I might be.

Senator METZENBAUM. Then would you be good enough to stand. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MODELL. I do.

Senator METZENBAUM. Thank you.

Please proceed, Mr. Rozelle. I would suggest, if you have a lengthy statement, that you not read your entire statement. The entire statement of each of the witnesses will be included in the record. I would think that a statement no longer than five, maybe ten minutes would quite suffice to cover the issues.

Mr. ROZELLE. Yes, I have it condensed.

I am pleased today to address the NFL's contract with ESPN to televise eight regular season games and several other games during the 1987 through 1989 seasons. In my view, the league's telecasting of a limited number of Sunday night games on ESPN is entirely consistent with public and fan interest. It is also a decision reflecting the realities of the television marketplace.

Before I comment on the league's reasons for contracting with ESPN, I should briefly recap the NFL's television arrangements prior to this season. The NFL member clubs have televised their regular season and post-season games exclusively on network television for over two decades, about 25 years, actually. Two networks, NBC and CBS, have since 1970 regularly broadcast all NFL games played on Sunday afternoons.

In 1970, ABC began its Monday Night Football series and in later years televised a package of between four and six Thursday or Sunday night specials. In addition, all post-season games, including the Super Bowl, have always been televised by the major networks.

These television practices are well grounded in history and have long had the approval of Congress. In 1961, the NFL supported the bill that became the Sports Broadcasting Act of 1961. At that time, I was asked whether the league would support an express one-network limitation in the statute. I said that such a clause was unnecessary and that at some time in the future, and I quote, "the single network may no longer be desirable, and it may become much better for the public and the league to use more than one network." No one-network limitation was enacted in the 1961 statute.

In 1966, Congress enacted the legislation approving the consolidation of the American Football League and the NFL. In testimony at that time, I advised Congress of the plans of the two leagues with respect to television, stating that "because of the logistics of handling perhaps 13 or 14 games on a Sunday afternoon, it would require at least two networks." This was an integral part of the

plan of "merger" that was submitted to Congress and implemented under the 1966 statute.

In 1981, the league experienced the highest television ratings in its history, which led to contracts with the three networks totaling approximately $2,100,000,000 for the five seasons 1982 through 1986. Since 1982, however, the television picture has changed dramatically. For a variety of reasons, ratings have dropped, and as ratings have fallen, so have advertising rates and network revenues from advertising.

As a result, when we began our television contract negotiations early this year, the circumstances were very different from 1982. We faced a much "softer" advertising marketplace, and each of the three major networks also had new ownership that was committed to holding down costs, including the costs of programming. Each of the networks thus proposed sharp reductions in what they would pay for NFL television rights. ABC openly discussed dropping Monday Night Football altogether.

Another important change since 1982 was the growth of cable television and cable programmers such as ESPN, Turner Broadcasting, USA Cable and others. Programming on these systems now reaches many millions of households throughout the country. As we considered our options for 1987, 1988 and 1989, the realities were such that we could not help but listen to proposals for limited use of cable television.

Overall, the league's four contracts—ABC, CBS, NBC, and ESPN—for the 1987-1989 seasons reflect the financial effects of the "softening" in the television advertising marketplace. In contrast with increasing television revenues that the league's member clubs had obtained since 1970, the television revenues of the 28 clubs for 1987 through 1989 will decline by some 3.3 percent from 1986 levels—a drop that would obviously have been much greater without the ESPN contract.

The league's agreement with ESPN is a carefully structured and limited use of cable that involves only 13 games each year: four of the 58 preseason games, eight of the 224 regular season games, and the Pro Bowl played between the top players in the league's two conferences, the AFC and the NFC. ESPN will not carry any of the nine post-seasons championship games leading to the Super Bowl or the Super Bowl itself.

In short, under our current contracts, 97 percent of the NFL's regular and post-season games will be available on standard broadcasting television exclusively.

In testimony before the full Senate Judiciary Committee in 1982, I was asked about the league's plans for cable television. I said then that we had no plans for cable, but that I expected, after 1986, "to basically . . . stay on free television, with some deviation for cable or pay or whatever is developed in the technology." As our negotiations this year turned out, we have ended up with a limited "deviation" with our ESPN cable contract, but this particular development certainly was not something I could have predicted in 1982.

Under our ESPN contract, we have required that every game televised by ESPN on cable be simultaneously telecast on a broadcast station in the home city of the visiting team and, if the game

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is sold out in advance, in the city of the home team as well. Thus, in the markets of the two participating teams, there will be simultaneous coverage by both a broadcast television station and ESPN. To our knowledge, no other sports programmer—college or professional—has ever required such simultaneous over-the-air telecasts when presenting its events on a cable network.

I will be pleased, of course, Mr. Chairman, to answer any questions you might have, and Mr. Modell will be available as well.

[The statement of Mr. Rozelle follows:]

STATEMENT OF PETE ROZELLE

Commissioner of the National Football League

BEFORE THE ANTITRUST, MONOPOLIES AND
BUSINESS RIGHTS SUBCOMMITTEE
OF THE JUDICIARY COMMITTEE
OF THE
UNITED STATES SENATE

October 6, 1987

STATEMENT OF PETE ROZELLE

I am pleased today to address the NFL's contract with the Entertainment and Sports Programming Network (ESPN) to televise eight regular season games and several other games during the 1987-1989 NFL seasons. I will also offer the NFL's views on Senate Resolution 291 introduced last week by Senator Specter.

In my view, the League's telecasting of a limited number of Sunday night games on ESPN is entirely consistent with public and fan interests. It is also a decision reflecting the realities of the television marketplace.

Before I comment on the League's reasons for contracting with ESPN, I should briefly recap the NFL's television arrangements prior to this season. The NFL member clubs have televised their regular season and post-season games exclusively on network television for over two decades. In the meantime, all of the other major professional sports leagues and major college sports have made extensive use of cable or pay television.

In the NFL, two networks, NBC and CBS, have since 1970 regularly broadcast all NFL games played on Sunday afternoons. Most are televised on a regional basis; some are televised nationally. In 1970, ABC's Monday Night Football series began, and in the mid-1970's ABC began to televise a

package of between four and six prime-time "specials", generally on Thursday or Sunday nights. In addition, all post-season games, including the Super Bowl, have always been televised by the major networks.

These television practices are well-grounded in history and have long had the approval of Congress. In 1961, the NFL supported the bill that became the Sports Broadcasting Act of 1961. In testimony at that time, I explained that the League wanted to sell its television rights to a single network in order to assure the access of all clubs to television and to provide balance within the League. I was asked whether the League would support an express one-network limitation in the statute. I stated that such a clause was unnecessary and that at some time in the future "the single network may no longer be desirable, and it may become much better for the public and the League to use more than one network." No one-network limitation was enacted in the 1961 statute.

In 1966, Congress enacted legislation approving the consolidation of the American Football League and the NFL. It did so by overwhelming margins in both the Senate and the House. In testimony at that time, I advised Congress of the plans of the two leagues with respect to television, stating that "because of the logistics of handling perhaps 13 or 14 games on a Sunday afternoon, it would require at least two

networks." This was an integral part of the plan of "merger" that was submitted to Congress and implemented under the 1966 statute.

By 1970, we sensed that fan interest in the NFL had created an opportunity to put NFL football on prime-time television. We offered a prime-time series of games to CBS and then to NBC. Neither expressed interest in such a package of games, and it was only then that we went to ABC, which agreed to try Monday Night Football. Needless to say, it proved to be extremely popular programming, and other sports have since followed the NFL into prime time.

We believe that our television policies have clearly been in the interest of our fans. The NFL is the only professional sports league that televises every game played by every one of its teams. All of a club's road games are brought back to its home market. In addition, the League has voluntarily adhered to the principles underlying the 1973 legislation requiring local telecasts of all sold-out home games, and has televised sold out home games in the home markets.

We have attempted to balance the demands of the fans and Congress for more NFL telecasts with a well-founded sensitivity to possible overexposure and negative effects on the clubs' ability to sell tickets for their games. The League's policies have worked well, and NFL football has recorded steadily increasing levels of television viewership, with the

Super Bowl attracting audiences as large as 127 million viewers. The ten highest rated sports programs in television history are all Super Bowl games, and eight of the ten most watched programs of any kind are Super Bowls.

In 1981, the League experienced the highest television ratings in its history, which led to contracts with the three networks totalling approximately $2.1 billion for the five seasons of 1982 through 1986. Since 1982, however, the television picture has changed dramatically. For a variety of reasons ratings have dropped, and as ratings have fallen, so have advertising rates and network revenues from advertising.

As a result, when we began our television contract negotiations early this year, the circumstances were very different from 1982. We faced a much "softer" advertising marketplace, and each of the three major networks also had new ownership that was committed to holding down costs, including the costs of programming. Each of the networks thus proposed sharp reductions in what they would pay for NFL television rights. ABC openly discussed dropping Monday Night Football altogether.

Another important change since 1982 was the growth of cable television and cable programmers such as ESPN, Turner Broadcasting, USA Cable, and others. Programming on these systems now reaches many millions of households throughout the country. As we considered our options for 1987-1989, a number

of cable entities from across the nation were ready and willing to submit proposals for the rights to certain NFL games. The realities of television were such that we could not help but listen to them.

Ultimately, no network made an attractive offer for the "specials" games. As a CBS executive has publicly stated, "the product going to cable was a product that the networks didn't, wouldn't, couldn't choose to carry. We had a chance to pick up those games and passed." In the final analysis, we selected the ESPN proposal, because it was superior on all relevant criteria, including number of homes served, experience in sports television, production and promotional abilities, and financial benefits to the NFL.

Overall the League's four contracts (ABC, CBS, NBC, ESPN) for the 1987-1989 seasons reflect the financial effects of the "softening" in the television advertising marketplace. In contrast with increasing television revenues that the League's member clubs had obtained since 1970, the television revenues of the 28 NFL clubs for 1987-1989 do not increase over 1986 levels. In fact, they will decline by some 3.3 percent from 1986 levels -- a drop that would obviously have been greater without the ESPN contract.

The League's agreement with ESPN is a carefully-structured and limited use of cable that involves only 13 games each year -- four of the 58 preseason games; eight of

the 224 regular season games; and the Pro Bowl game played between the top players in the League's two conferences -- the AFC and the NFC. ESPN will not carry any of the nine post-season championship games leading to the Super Bowl or the Super Bowl itself.

The League's programming on ESPN also includes several other elements. On the first eight Sunday evenings of the regular season, ESPN is to televise a one-hour taped program of highlights of the NFL games played earlier that day. During the second half of the season, this highlights program is to be reduced in time and will be the lead-in to the eight games to be televised live.

The Super Bowl and all of the League's playoff games will obviously continue to be presented on network television. In short, under our current contracts, ninety-seven percent of the NFL's regular and post-season games will be available exclusively on standard broadcast television. At the end of this contract, the League has no obligation to continue or to renew with ESPN.

In testimony before the full Senate Judiciary Committee in 1982, I was asked about the League's plans for cable television. I said then that we had no plans for cable, but that I expected, after 1986, "to basically . . . stay on free television, with some deviation for cable or pay or

whatever is developed in the technology." As our negotiations this year turned out, we have ended up with a limited "deviation" with our ESPN cable contract, although this particular development certainly was not something I could have predicted in 1982.

Under our ESPN contract, we have required that every game televised by ESPN on cable be simultaneously telecast on a broadcast station in the home city of the "visiting" team and, if the game is sold out in advance, in the city of the "home" team as well. Thus, in the markets of the two participating teams there will be simultaneous coverage by both a broadcast television station and ESPN. To our knowledge, no other sports programmer -- college or professional -- has ever required such simultaneous over-the-air telecasts when presenting its events on a cable network.

The preseason telecasts on ESPN have been very well received by NFL fans. They have produced some of the largest audiences in the history of cable television. Fan acceptance of these preseason games on ESPN has been beyond many expectations. So far it suggests that our decision to make these telecasts available through ESPN was a sound one.

The League's contract with ESPN involves no restraint of trade, either in telecasting terms or in the NFL clubs' equal sharing of the revenues from that contract. Nor does it involve any telecasting restriction that gave rise to

the 1961 sports telecasting law. The contract is entirely proper under ordinary antitrust principles of general application and without reliance on the 1961 law.

The revenues from the ESPN contract are being shared equally by the 28 member clubs. Such sharing of television revenues -- whether from network or other telecasts -- is not directly addressed by the terms of the 1961 statute. Such sharing is required by the NFL's Constitution and By-Laws and is based on the same principle as gate receipt sharing. It reflects the joint production of all of the League's televised games and is inherent in the co-production of the League's televised product.

Because the ESPN contract contains no automatic right of renewal, the NFL will have the opportunity again to evaluate its television prospects following the 1989 season. It may be that the Sunday night games on ESPN will be successful enough that one or more of the networks will make proposals to carry such games. To do so, however, a network would have to revise its present approach to Sunday night programming. Or cable programmers other than ESPN may again submit proposals in competition with ESPN.

Whatever decision we make as to future television arrangements will be a responsible one that fully accounts for the interests of our fans and the views of Congress. In evaluating the League's future plans, we will certainly recognize that we have no interest whatsoever in alienating our fans or

losing public support by making it difficult for fans to see NFL football on television.

In recent years, cable television has become widely accepted as a medium serving the sports public. Other sports have been far more aggressive than the NFL in exploring the potential of cable television. Given the NFL's success with its network format, we have not seen a need for major changes or been anxious to move into cable television. The League's long term economic interests are clearly dependent on the continued support of its very broad fan base, and we will certainly be responsive to the League's fans as we assess the potential impact of any changes in our telecasting formats. It would be extraordinarily shortsighted of the League to pursue policies affecting cable television that would jeopardize fan support. In this respect, to suggest that the public interest will be harmed by changes in our broadcast policies is to assume that the League and its member clubs will lose touch with their vital fan constituencies. I can assure you we have no intention of embarking on such a course.

Let me now turn to Senate Resolution 291. The resolution principally calls on the Antitrust Division to study and report on "the implications of new technology, specifically cable television and pay-per-view television services, on the application of existing antitrust laws to the telecasting practices of the National Football League." We

question the need for such a study, but are confident that any study would conclude that the League's television contracts are entirely lawful. Since 1961, the Department of Justice has on a number of occasions considered various aspects of the NFL's television practices, and it has never concluded that there was cause for any corrective action.

In addition, if such a study of television technologies is to be undertaken, we suggest that it should logically cover the other professional sports that are also entitled to sell their television rights under the 1961 telecasting law -- baseball, basketball, and hockey. New television technologies have been developed and existing technologies have evolved since Congress referred to "sponsored telecasting" in the 1961 law. At that time, there were references to other forms of television such as pay TV, subscription television, and closed circuit television. Cable television existed but was not a focal subject at that time. Developments since then have the potential to affect all professional sports, not just the NFL. Any review of these matters should thus encompass developments in television technology as they may affect all of the professional sports leagues.

Thank you for the opportunity to appear before you today.

Senator METZENBAUM. Commissioner Rozelle, I think the real concern that we in the Congress have, and I think the people of this country have, is whether this is the proverbial story of the camel's nose under the tent, and whether this is the first move to cable television, pay television, and then a second step and a third step to the point where football cannot be seen across the breadth of this nation unless you are willing to pay for it.

What assurances can you give the American people that that will not be the fact? And is it necessary for Congress to enact new legislation at this point in order to be certain that the camel's nose does not proceed any further and get the whole camel under the tent?

Mr. ROZELLE. Well, number one, I would say that our past track record shows that we are so dependent economically on broadcast television, about 60 percent of our income comes from broadcast television, and it is primarily responsible for the economic health of the NFL.

Senator METZENBAUM. I do not think that——

Mr. ROZELLE. I would like to further say in line with that, we are the last, the last, to go on cable television. Today, you have college football, college and professional basketball, hockey, and baseball on cable throughout the country, and they have been on cable for many years, individual teams and league packages; while all this time the NFL has been on broadcast television and in 1987, for the first time, will have this mini-package I spoke of.

Now, the way the mini-package originated was this: ABC had five games in 1986, so-called specials. They were on Thursday night or Sunday night. When Mr. Modell and I got into negotiations, we found out that ABC was not interested in carrying those specials this year, and neither were CBS nor NBC. So we had five games that we were deriving considerable money from television for where we did not have a marketplace.

So we took those five games that no one wanted on commercial television and just added three to them for this eight-game mini-package. So I would basically answer you, Mr. Chairman, by citing the success of the NFL on broadcast television and our past history, our very limited use of cable, and our protection of the competing team fans by insisting upon free broadcast television simultaneously with the cable.

Senator METZENBAUM. I think what you have done in that respect makes sense and it is reasonable. But you made a point, and that is that we could not afford to because 60 percent of our revenue comes from the free television, ABC, CBS, NBC.

Query: When a combine or a single cable network comes in and says, "We will pay you that much more than you can receive through one of the presently accepted networks," and the networks say, "We cannot afford to pay you as much because the advertising revenue is not as great," as you have already indicated in your statement, then can the American people expect that there will be less and less free football on television and more and more on pay television? That is the concern we have.

Mr. ROZELLE. Well, we have, I think, three percent of our product on cable. As I say, all other sports, also covered by the 1961 Sports Broadcasting Act, have a great number, more cable telecasts. I can

answer your question only by saying I do not feel that the cable people will be able to, under present technology, match the dollars of the networks. And even if they did, I think that we would probably want to stay on the networks because we have made our success out of appealing to our fans. When we lose those fans, we will be in deep trouble.

Senator METZENBAUM. Let me ask you one other question. If ESPN had not entered negotiations for the eight-game package, would you have accepted the ABC bid?

Mr. ROZELLE. Yes, the ABC bid was on Monday night. The eight-game specials was a Sunday night series that ABC was not interested in. So our contract arranged with ABC that we accepted covered just Monday nights.

Senator METZENBAUM. I am going to open. On this first round I think I ought to pass it on to Senator Specter and Senator Hatch. But I want to say that I think the National Football League ought to understand that there is a very strong feeling in Congress—and I do not think we would have too much trouble in moving a legislative package through on a fast track—to see to it that free television coverage of the football games is continued in this country. And you open the door to the question as to whether or not we should be taking a look at the limited access to some of the other sports programs that are on cable television at the present time. And I assure you, we will do that.

I think that many of us feel that those airwaves were given to certain television owners, and I think that we feel that to preclude those airwaves from being able to view football games, which has become a national pastime, I think we feel that would be a disservice. I also believe that it does concern us as to whether it does not violate, in spirit if not in language by reason of the 1961 enactment, the antitrust laws of this country. But those laws, as you well know, are changeable.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Commissioner Rozelle, at the outset, I would like to emphasize the difference that I see between professional football, baseball, or hockey or other sports. No other sport is like professional football in having the competition for carrying its wares on all three major networks. And no other sport has attracted the tremendous fan interest that football has commanded with its Sunday coverage on CBS and NBC and Monday Night Football.

I would not object if any of my colleagues wants to suggest that the FTC or the Department of Justice investigate baseball or hockey or anybody else on cable. I just do not think it gets near the antitrust issue of reducing a program for increasing costs. And I am not drawing the conclusion today that football does either, but I just do not think the other sports are remotely near the application of monopoly power to increase price by reducing product, which I think you have in football. That is why I have looked at football in my resolution, but I do not have any objection to broadening it.

I believe that it is our job on the Judiciary Committee and in the Congress to read the fine print, and I understand your responsibilities to the league and I understand that you cannot predict what

the future is going to have. That is why I think we really have to read the fine print, and we have to press you as hard as we can to get whatever assurances we can, consistent with what you can realistically give. And then we have to make a judgment.

But I go back to 1961 and your testimony which appears at Page 35 of the hearings before the Committee on the Judiciary of the House of Representatives back on August 28, 1961. "Mr. Rozelle. If I might say, there is no intention on our part of using more than one network if this legislation is passed."

Now, that was in the context of consideration to have a legislative limitation, and you made the response that "There is no intention on our part of using more than one network." Well, I accept that. That was your intention in 1961.

Mr. ROZELLE. That was my testimony in part then, too, Senator.

Senator SPECTER. Yes. That is right. But I think that is the critical part. If you would like to supplement it at this point and restate your other testimony, I would be glad to hold up on my question and give you a chance to do that.

Mr. ROZELLE. Well, I would like to explain it. My testimony in 1961 was that we felt that limiting it to one network was unwarranted. I said, "Perhaps 20 years from now, some time in the future"——

Senator SPECTER. Could you refer to your specific testimony, please?

Mr. TAGLIABUE. It is on the same page, Senator Specter. Page 35.

Mr. ROZELLE. Yes. Page 35, right at the bottom of the page, Senator, where I say:

> However, I do not feel that such a clause is necessary, and perhaps 20 years from now the television picture will change. The single network may no longer be desirable, and it may become much better for the public and the league to use more than one network.

Senator SPECTER. Well, I am, of course, aware of that, and it may be that Congress might have been better advised at that time to legislate the limitation of one network and then say to the National Football League, if you have a change in circumstance come back to us. Maybe that would have been a better course on our part. Perhaps we will have to learn from our prior experience, candidly, in an arm's length relationship, to protect the public. That is really what we are trying to decide, what I am trying to focus on as an individual Senator.

And you said that things might change in 20 years, but you said it was your intention to go to one network at the outset.

Now, in your testimony today, you have referred to your 1982 testimony, which says, at the bottom of Page 6:

> I said then that we had no plans for cable, but that I expected, after 1986, "to basically . . . stay on free television, with some deviation for cable or pay or whatever is developed in the technology."

Well, that is somewhat helpful but really more ambiguous, because you talk about basically staying on free television but allowing yourself latitude for deviation for cable or pay or whatever is developed in the technology. And my basic question to you and my thought on the basic issue of these hearings is: What is the maxi-

mum assurance you can give this Committee and the American people that the NFL will stay on free television?

Mr. ROZELLE. I cannot commit the National Football League in perpetuity or even for five years. I can only say look at what we have done.

You talk about protecting the public, Senator. We have virtually saturated the public; we have given them television. Ninety-seven percent of our games are on free television; three percent are on cable. In this situation, we are the only sport that televises every game, delivers it back to the home city of the visiting team. We also lift the blackout when we followed the spirit of the past congressional act; and when there is a sellout within 72 hours, we also show it live in the home city.

So I am saying that we are doing just what you say you would like to do, protect the public. We have given the public more national television than all other sports put together.

Senator SPECTER. Commissioner Rozelle, you are the only sport which televises every game back to the home public, and you are the only sport which enjoys that kind of public acceptance. You televise those games because there is enormous public demand for those games. It is not a matter of largess of the National Football League. It is a matter of keen interest of the American football-watching public. And that is the way it should be.

But with all due respect, I do not know that bouquets are in order for your televising it back. It is more a response from the viewing public which has caused that.

But let me come back to my principal question. I appreciate your candor, Commissioner Rozelle, in saying that there are no assurances that you can give. I think that is the basic facts of the business of professional football, and I think that this Committee has to take that into account in our legislative agenda.

You say in your testimony that you do not believe that cable can match the network revenues, and that even if it could, even if cable could match the network revenues, that there would be a disinclination on the part of the NFL to move from network to cable because we would not want to lose our fans.

Now, I think that is the vital consideration, and I do believe that the fan interest is paramount in all of sports. I believe that sports are unique, that there is a quasi-public interest that we talked about back in 1982 when you wanted hearings here because of the problem with the Oakland Raiders. And the Committee convened hearings within ten days at your request at that time, and we talked extensively about an antitrust exemption to give the league the authority to limit movement of franchises, even though traditionally franchises were deemed to be private property because of the view of some of us that professional sports, professional football was affected with the public interest and there was a right on the part of fans to have a team stay in its home town if it had a decent stadium and if the team was making money and that a football franchise, a sports franchise, is not like any regular piece of property.

But under what circumstances would you stay with network free television instead of going to pay television in the fans' interest?

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Mr. ROZELLE. I think you have just explained why. You have described the interest on the part of the public in the National Football League, where we are the first sport to go on prime time, Monday night television. It is the longest running prime-time show on ABC, since 1970. You described CBS's and NBC's extensive coverage on Sundays and our post-season schedule. That came about, Senator, through careful use, intelligent use and lucky use of regular television, broadcast television.

We realize that. Mr. Modell, myself and the other owners, they knew it was judicious use of broadcast television that has captivated the public and given us an opportunity to present our sport in the best light, free television. And if you think we are going to give that up, we are most reluctant in the future—it will not be when I am around. Maybe someday technology will change, and maybe it will be a different system of carrying the games on a picture. But as long as I am around, I am sure that we are always going to keep in mind the public and Congress. We are not going to do anything rash involving shifting our games from broadcast television to cable television. It is just a miniseries we have established because we are concerned about you, Senator, and we are concerned about our public.

Senator SPECTER. Well, I am going to defer now to Senator Hatch.

Mr. MODELL. May I add a point to that?

Senator SPECTER. Yes, Mr. Modell.

Mr. MODELL. Not only is the changing technology something that nobody can foresee, but when we started out in 1961, the three networks enjoyed 98 percent of the television audience. Today, it is about 70 percent and slipping with the emergence of cable, independent stations, and we do not know what in 10 years or 15 years we will have. Maybe cable will be the only form of transmissions.

So to share his thoughts, it is impossible to predict or prophesize what might happen years downstream. But our near term, intermediate term goal is to broadcast, telecast our games to the widest possible audience, and that only can be done with a predominance of free television of the three networks.

Senator SPECTER. Well, if cable turns out to be the only means of transmission, we will not object to it.

Senator Hatch.

Senator HATCH. That is right. Welcome here, Commissioner Rozelle and Mr. Modell. Good to see you again, Pete.

Mr. ROZELLE. Senator.

Senator HATCH. Let me put into the record, if we can, Senator Specter, a letter from the Federal Trade Commission signed by Emily H. Rock, Secretary, which I think gives at least a preliminary viewpoint from them on this matter.

[The letter of Ms. Rock follows:]

OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OCT 6 1987

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies,
and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Metzenbaum:

Thank you for your letter of September 29, seeking the Federal Trade Commission's views concerning the antitrust implications of the Sports Broadcasting Act[1] (the "Act") on the National Football League's (the "NFL") recent contract with ESPN. The Commission was informed last week of the Subcommittee hearing scheduled for October 6, 1987. Although the time we have been given to reply is limited, we will comply with your request to the extent that we are able.

The Act provides in part that the antitrust laws "shall not apply to any joint agreement by or among persons engaging in or conducting . . . [certain sports, including professional football] . . . by which any league of clubs participating . . . [in those sports] . . . sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games. . . ."[2] The NFL contract in question grants to ESPN the exclusive right to broadcast nationally certain Sunday night NFL games. The Act was passed in 1961 in response to the decision of a U.S. District Court that the NFL's exclusive contract with CBS violated a 1953 consent order that prohibited the league or individual clubs from agreeing to restrict the area of telecasts of games.[3] The NFL purportedly believed at that time that an exclusive agreement to sell all telecast rights of all clubs was necessary in order to equalize television revenue received by the clubs. If such revenue were not equalized, the league thought that clubs in smaller cities would derive less revenue than the clubs in larger broadcast markets and would, over time, become less competitive, perhaps to

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[1] 15 U.S.C. § 1291 et seq.

[2] Id. § 1291 (emphasis added).

[3] United States v. National Football League, Civ. Action No. 12808, consent order, Dec. 28, 1953.

the point of extinction through bankruptcy. It could be argued that the league is a joint business venture that markets competition among its members, the product supplied depends upon the continued operation of the clubs. In a typical competitive environment, of course, the loss of a firm would not have an adverse effect on its competitors or consumers.

Based on the statute and legislative history, it is arguable that Congress did not intend to provide an antitrust exemption for the type of service offered by ESPN. In interpreting the antitrust laws and statutes that circumscribe those laws, we believe that it is important to consider the intent of Congress in enacting a particular exemption, as well as the Supreme Court's clear admonition that exemptions from the antitrust laws should be narrowly construed. However, too narrow a reading of the language of the exemption may result in unexpected consequences. Without further study, for example, it is unclear whether a strict limitation on the exemption could have the unanticipated effect of reducing the willingness of the NFL to deal with alternative transmitters of football games and whether this in turn might have the effect of reducing competition among alternative suppliers of sports to fans.

I hope that these comments aid the Subcommittee in its deliberations. The Commission's staff intends to study the economic and legal implications of the sale of broadcasting rights by professional sports leagues. If you are interested in the results of this analysis, we would be happy to provide them to you at a later time.

By direction of the Commission.

Emily H. Rock

Emily H. Rock
Secretary

Senator HATCH. Mr. Rozelle, has the NFL ever represented to Congress in public or in private that it would not place games on cable television?

Mr. ROZELLE. No, sir, we have not.

Senator HATCH. You have never said that?

Mr. ROZELLE. No.

Senator HATCH. In the 1961 antitrust exemption, you use the term "sponsored telecasts." Now, some have suggested that this term or these terms meant that only negotiations for free network television would be exempt from the antitrust statutes, and that "unsponsored" cable broadcasting would not fall under the exemption.

Now, is this your understanding of what "sponsored broadcasts" really were meant to be?

Mr. ROZELLE. Well, there may be some uncertainty. Of course, I was here in 1961 when we sought that legislation and it was passed for all sports. We do not interpret that statute as authorizing a cable package as cable is now constructed.

Senator HATCH. It really seems to me that the real crux of this issue is the fear that somehow the NFL would band together and put its entire schedule of games on cable, as has been alluded to by both Senators Metzenbaum and Specter. Thus, that would deprive the fans without a cable hookup of their viewership of professional football.

Now, is the current eight-game contract the forerunner of a substantial transfer of regular season NFL games to cable?

Mr. ROZELLE. We have no plans for a radical change in our present television planning. Mr. Modell can speak for himself, but we feel the present eight-game mini-package is ideal.

Mr. MODELL. I cannot foresee any radical move in that direction. Certainly, for the three years that we now have under contract, we are prohibited from doing any more than we are. And, frankly, I cannot reiterate the importance to the teams, to my team in Cleveland, to other teams, to our sport in totality, to disseminate our games and present our games to the widest possible audience.

When you have an HBO with 16 million homes that is a premium, pay-per-view channel, that would just be counterproductive to the interest of the National Football League. We have built our popularity, we have built our ratings, we have built our live audience through the wide distribution through normal television channels.

Senator HATCH. Tell me what considerations would the NFL take into account before considering, say, a major switch to cable. What would be your considerations?

For instance, would the Super Bowl ever, for instance, be placed on cable?

Mr. ROZELLE. I can never envision it on cable. We have 127 million people, I think, that watched our top-rated Super Bowl game. Of the top ten sports shows on television of all time, all ten are Super Bowls, and many of the top ten shows involving any type of show other than sports are Super Bowls.

So we have more or less lived on the Super Bowl being on commercial television, and frankly, it is a vital factor in negotiating with the networks our regular season, where we rotate the Super

Bowl with CBS, NBC and ABC. It means so much to them to have the Super Bowl, even one of three years, that we have been able to negotiate fine regular season contracts with all three.

Senator HATCH. Well, let me ask you this. I alluded to this in my opening remarks, but is professional football really any different from, say, basketball or hockey with regard to television viewership? And should we single out football for antitrust inquiries?

Mr. ROZELLE. Well, all sports were included in the 1961 Sports Act, television act, so I assume if you are going to do something, all sports will be included. We do not feel it is warranted, however, at this time.

Senator HATCH. All right. Well, I appreciate your comments.

Mr. MODELL. I would just like to add to and emphasize what Mr. Rozelle said: that on a free basis we televise more national games than baseball and basketball combined, and have done so for many years. And we are the last sport, college or professional, to even dip our toe in the cable waters with this mini-package.

Senator HATCH. That has been my impression.

Well, I just want to express my appreciation for both of you being here, and I want to wish both sides well. I hope you can effectively bring this strike to a conclusion, because I think fans all over America are bereft. They do not know what to do on the weekends any more.

Mr. MODELL. I am idle, too.

Senator HATCH. It is a terrible calamity when you think about it. But I have to say that I have really enjoyed watching the games as they were. I think these kids are playing their hearts out. You know, I know it is a very difficult situation for both sides. I just wish you well, and I hope you can get it resolved.

Mr. ROZELLE. Thank you, Senator.

Senator SPECTER. Just one or two more questions, gentlemen.

When you testified, Commissioner Rozelle, that there was no alternative to the ESPN contract, I would like to pursue that. In the past, Monday Night Football and its Sunday night edition and its Thursday night edition, you had a hard time figuring out which night it was when you flipped on television on Thursday and say Monday Night Football, Thursday night edition. It was somewhat complicated.

I do not know how much light you can shed on this particular point, but I had a question in my mind—and I have had some preliminary talks with people at ABC, and we are going to have Mr. Grimes, the President and CEO of ESPN on, but I want to pursue this with you—as to the inter-relationship between ESPN and ABC. ABC owns a big part of ESPN.

It was a thought on my mind that if ABC did not own ESPN, ABC might have had a little more interest in taking the Sunday night edition of the football game. But when they had a cable network in the wings that they could assign it to, that was very convenient. And had that relationship not existed, the Sunday night games might have been covered, and we might have been able to see them nationwide on network.

Mr. ROZELLE. I think it was clearly a situation involving ratings and dollars and cents. The special games on Thursday night or Sunday night, the five that were carried the previous several years

on ABC under our old contract, did not do well. The network lost a considerable amount of money on their overall contract with us prior to 1987.

The special games were just an added drag on their losses, and I do not think their financial interest in ESPN had anything to do with the fact that they were not interested in these specials. Because NBC and CBS were not interested either.

Mr. MODELL. Senator, I might add that we offered the Sunday night mini-package to Fox Television, an over-the-air carrier, before we entered into a contract with ESPN, and they rejected it.

Senator SPECTER. When you talk about losing money, though, about the networks losing money, what you are saying is that they cannot command advertising at rates comparable to what they would get on other programs. If they are losing money, why is Monday Night Football staying on?

Mr. ROZELLE. There was some talk that ABC would not renew because of the recent soft sales during our previous contract that ran through 1986. But in the final analysis, they did renew, and we are very happy to be on ABC for Monday night. As I say, it is the longest running prime-time show on the network, 17 years.

Senator SPECTER. Mr. Rozelle, you refer to most games staying on free television, but has there been any consideration for key games, like the playoffs or the Super Bowl, going on to pay television? We now see the phenomenon of boxing matches going on closed circuit television, producing enormous sums of money.

Has there been any consideration at all by the NFL to putting the key games, Super Bowl, playoffs, on pay television?

Mr. ROZELLE. No. Mr. Modell is the chairman of the Broadcast Committee, and I work very closely with him. We have never even——

Mr. MODELL. We have never thought of it, and the networks would not stand for it because the playoff games are an integral part of their package. It builds up a momentum as the season goes on and into the wild card games, the divisional playoffs, the conference playoffs, and then ultimately the Super Bowl. That is critical to their advertising relationship that they have.

Senator SPECTER. Well, you have the baseball games not televised, and then the playoffs and the World Series are televised. Why not that analogy for pro football moving from network television to pay television?

Mr. MODELL. I missed that, Senator. I am sorry.

Senator SPECTER. Well, I am just referring to baseball which does not have network coverage of all its baseball games, but then when the playoffs come they do move to network coverage.

Mr. MODELL. But every team has their individual coverage of baseball games year long.

Senator SPECTER. Yes.

Mr. MODELL. All 162 games of the Yankees are televised in one form or another in New York City.

Senator SPECTER. Well, that is another subject that we will not get into today. But there is precedent in baseball for treating the playoffs and the World Series on a significantly different level than the regular season games. The regular season games do not have network coverage. You have some on Saturday afternoon and occa-

sionally on Sunday afternoon and occasionally on Monday evening, but there is not the kind of network coverage for regular season baseball games. But then when the playoffs come and the World Series comes, it is network coverage.

That is why I asked the question as to whether there could be a differentiation by professional football for playoff games or Super Bowl being on pay television. But I am delighted to have your flat assurance that there is no contemplation of pay television for Super Bowl, playoffs, et cetera.

Mr. MODELL. I have never had a single conversation with anybody in that regard, ever.

Senator SPECTER. Okay.

I would like to disagree with Senator Hatch, even though he is gone, on one small point. That is about the adequacy of the substitute games on this past Sunday. I would join my colleague, Senator Metzenbaum, Commissioner Rozelle, in urging you to do everything you could personally to lend your good offices to settle the strike. You have been a very powerful force in the National Football League for many, many years. I believe you became Commissioner in the 1950s.

Mr. ROZELLE. 1960, Senator.

Senator SPECTER. 1960. Okay. But you have been the Commissioner for 27 years, one of the toughest jobs around, pulled together the National Football League in an era of extraordinary growth and extraordinary complexity, and you have appeared before this Judiciary Committee on many occasions in my short tenure in the United States Senate. I think you have always done a very able job, and I think you have done a very able job here this morning.

I would very much like to see your talents used this afternoon to settle the football strike.

Mr. ROZELLE. I would love to, believe me. It is so terribly frustrating, Senator.

Mr. MODELL. I would like to add a thought in that regard. Yes, I echo your sentiments on what he has done for 26, 27 years. But if the players were to accept him as a neutral Commissioner, which he really is, this strike never would have gotten off the ground. They view him as an owners' appointee, and that gives us great difficulty.

Senator SPECTER. Well, the strike has gotten off the ground, but I think it is a little different ball game today than it was a week ago. We have had a week of substitute players. I think the American public is totally dissatisfied with that. There have been incidents around the league which are not a credit for anybody. And I think it is time it came to a close. If there is one man who could probably do it better than anyone else, if anybody could do it, it is Commissioner Rozelle. So we are going to let you go early, Commissioner.

Mr. ROZELLE. Thank you, Senator.

Mr. MODELL. If I might offer some personal bias, but I enjoyed our win in Foxborough Sunday.

Senator SPECTER. You might lose next week, Mr. Modell.

Mr. MODELL. That is right. Probably will.

Senator SPECTER. Thank you very much.

Senator Metzenbaum has asked me to proceed with the hearings in his absence. I would like to call now Mr. William Grimes.

Mr. Grimes, welcome to the hearing. We very much appreciate your coming and being willing to testify here today. We understand that it is not an easy matter for you, considering the fact that there is an FTC investigation ongoing, but we thank you for coming and look forward to your testimony.

Your full statement will be made a part of the record, and to the extent that you can summarize, we would appreciate it. If you would introduce the gentleman with you, I would thank you for that as well.

Let me start by asking you to rise to be sworn. Do you swear that the testimony that you will give before this Senate Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. GRIMES. I do.

TESTIMONY OF WILLIAM GRIMES, PRESIDENT AND CEO, ESPN, NEW YORK, NY, ACCOMPANIED BY A. DOUGLAS MELAMED, WILMER, CUTLER & PICKERING, COUNSEL TO ESPN

Mr. GRIMES. Thank you, Senator. With me on my right is Mr. Douglas Melamed of the law firm of Wilmer, Cutler & Pickering. I had submitted a statement, and I would like to summarize from it.

I am pleased to appear before this Committee and to have the opportunity to discuss how we believe that the public will benefit from ESPN's television NFL football games to viewers throughout the Nation.

As you may be aware, ESPN is an advertiser-supported sports television service. It is the country's most widely distributed cable television programming service and is provided to viewers as part of the basic cable television package by all participating cable television systems. ESPN programming is presently provided to approximately 44 million households in the United States by a variety of modes of distribution, and the number of new homes is growing very rapidly. ESPN is also seen in 26 foreign countries and is broadcast over the Armed Forces Television Network.

In the past year, ESPN has broadcast over 3,800 hours of live or original sports programming, covering more than 50 different sports. That number is more than twice the number of hours of sports broadcast by the three television networks ABC, CBS and NBC combined. Among the events that ESPN has covered in the past are the National Basketball Association, the Americas Cup, the National Hockey League, the Stanley Cup, CFA Football, NCAA Basketball playoffs, Davis Cup tennis, the U.S. Open, PGA and British Open Golf Tournaments and the United States Olympic Festival.

As the leading television sports programmer, ESPN has for some time been very interested in NFL football. Thus, in anticipation of the expiration of the NFL's television contracts earlier this year, ESPN made it clear to the NFL that it would be interested in negotiating for any television package that the league might offer to it for the coming seasons.

As you know, the NFL decided earlier this year to create a fourth television package, in addition to the traditional Sunday afternoon and Monday night TV packages. This fourth package

was to consist of games played on Sunday nights, and this package increased the number of games televised nationally.

We were delighted to have the opportunity to bid for the NFL television package, and after a period of negotiations the league accepted our offer for the Sunday night package. Our contract with the NFL runs for three seasons, 1987, 1988 and 1989. ESPN will be televising eight regular season games each season, less than four percent of the National Football League's regular season schedule. We will also televise four preseason games and the Pro Bowl each year. ESPN's package does not include any of the NFL playoff games or the Super Bowl.

In order to ensure that the Sunday night games will be available to all the fans in the cities of the participating teams, we agreed to make those games available to over-the-air television stations in the home markets of each of the participating teams, subject to the same blackout rules of the games telecast on the over-the-air networks. As a result, our NFL telecasts can be seen not only by virtually all of the 44 million homes reached by ESPN, but also by every viewer in the areas where the games are of the most interest.

It is, of course, true that the ESPN telecasts are not available on over-the-air television outside the markets of the participating teams. Nevertheless, we believe that ESPN's participation in NFL football will increase the availability of NFL games to television viewers throughout the country. In many cases, the games televised by ESPN will be available to a larger part of the country and will be seen in more homes than would have been the case if those games had been included in the over-the-air network packages. The reason is this: Most of the CBS and NBC games are broadcast only on a regional basis, sometimes not much beyond the cities of the participating teams. Therefore---

Senator SPECTER. If I might interrupt you on that, Mr. Grimes. If these programs had been included in the Sunday night edition of Monday Night Football, they would have been seen nationally, not regionally.

Mr. GRIMES. I am sorry, Senator. If they would have been?

Senator SPECTER. If the ESPN package has remained a part of the Monday Night Football program, the Sunday night edition of Monday Night Football, they would not have been telecast regionally; they would have been telecast nationally.

Mr. GRIMES. Senator, we are not certain that all of our eight regular season games came from what would have been or what was the ABC Monday night package. It is our feeling that at least three, and maybe more, of those games came from the over-the-air Sunday games on NBC and CBS that were, in fact, telecast on a regional basis.

Senator SPECTER. Do you know how many games from the Monday Night Football series had been televised on Sunday nights?

Mr. GRIMES. Again, we are not certain of that, but we believe that at least three of those games would have been telecast only on a regional basis and perhaps more.

Again, tying into that, by contrast, all games televised by ESPN will be available to virtually all of the 44 million households now served by our affiliates throughout the Nation, plus the additional

homes receiving the over-the-air telecast in the participating teams' home markets.

In summary, we believe that the ESPN's participation in the televising of NFL football has been good for competition and the public. It reflects enhanced competition for television rights, provides a new outlet for advertisers who wish to sponsor NFL telecasts, and increases the availability of NFL football to television viewers.

Senator SPECTER. Mr. Grimes, I am going to have to interrupt you at this point because five bells have gone off. I want to hear the rest of your testimony, but I have to go vote. Under our procedures, the votes come first and the vote is in process now, and I just have a few minutes to go the Senate floor. I will return to continue the hearing as promptly as I can.

[Recess.]

Senator SPECTER. We will resume the hearing at this point. I am sorry for the delay.

Mr. Grimes, let me start with a question before you proceed with your prepared text. That is, would ESPN like to cover the playoffs and Super Bowl?

Mr. GRIMES. Well, as a sports network that telecasts sports all day long, we are interested in virtually any sport that would become available to us. The practical realities of televising something like the Super Bowl really do not exist at this point.

Senator SPECTER. Would you think it within the realm of reality to make a bid for the playoffs or Super Bowl?

Mr. GRIMES. Not in today's reality; the economics of it, in my opinion, would not work.

Senator SPECTER. Perhaps in the future?

Mr. GRIMES. It is difficult to foresee the future, but perhaps, speaking from an economic point of view. But certainly today, it was a challenge for us to finance the current NFL arrangement that we just completed.

Senator SPECTER. Well, you had some help from ABC, Cap Cities.

Mr. GRIMES. We had some help from our parent company, and also we had some help from the cable industry.

Senator SPECTER. But it is something that you would consider and would obviously like to do because you are in the business of televising sports.

Mr. GRIMES. Yes, sir.

Senator SPECTER. And if you could put together a package to command the television of the Super Bowl or the playoffs, it would be quite a feather in your cap.

Mr. GRIMES. Well, it would be a feather, but, again, I do not think it is a feather that I will probably ever see in my cap. I listened to Commissioner Rozelle's statement earlier.

Senator SPECTER. Too small of a cap.

Mr. GRIMES. I just think, as I have mentioned, that the possibility of that kind of an event and the costs attendant to it are out of our realm certainly in the foreseeable future.

Senator SPECTER. Well, the concern that I have is that one day it might not be. It might become a reality for ESPN, or it might become a reality for ESPN considering the interests of ABC-TV or Cap Cities. I mean, it might become a reality depending on a whole

lot of factors, and the essential factor would be if it paid, if it made commercial sense. And at that stage, cable subscription to ESPN would skyrocket if you were the only source for the Super Bowl.

Mr. GRIMES. Well, Senator, you know, as a businessman running this network, if the league determined or decided to offer that kind of package and it were available to us to compete for, we certainly would make an effort to compete for it, if it made economic sense.

Senator SPECTER. Is it really necessary that the league make the offer of a package? Are you not in a position to make a bid for the Super Bowl or the playoff games?

Mr. GRIMES. Well, as a buyer of sports product, it is difficult to buy something unless it is, in fact, offered. So we might someday be in the position to make a bid, but, again, we could not unilaterally convince the league, I do not think, to sell us the product. The league would have to make it available.

Senator SPECTER. Well, it would take two to tango, two to make a deal, but you could make an offer depending on what you felt it was worth.

Mr. GRIMES. Yes, I suppose we could.

Senator SPECTER. Please continue with your testimony, Mr. Grimes.

Mr. GRIMES. I was on my last sentence, so I finished.

Senator SPECTER. Well, okay. Then I have asked my last question. I very much appreciate your being here. We thank you for coming. We know it is not easy. You are in the middle of inquiry and investigation, and I thank you for coming.

We are going to continue to monitor the situation because we feel we have a significant duty here. I do not know that the Senate has a role, but we have the 1961 legislation on the books, and we have the antitrust laws as they exist. But we have a concern as to what is going to happen in the future.

I watch ESPN. I have got cable in Washington. We do not have cable yet in Philadelphia. I think it is really scandalous that big cities in this country are without cable in so many, many places because of the problems of getting cable set and because of the background problems that are present on influence, which I think has stopped cable from being put through so many of the big cities.

I used to be a District Attorney and investigate problems of corruption in city government, and it is an enormous problem. I wonder to what extent that has limited the extent of cable. But those of us who have ESPN enjoy it very much, and I am one of them.

Mr. GRIMES. Thank you.

Senator SPECTER. I thank you very much.

Mr. GRIMES. Thank you, Senator.

[The statement of Mr. Grimes follows:]

STATEMENT OF
WILLIAM GRIMES
PRESIDENT, ESPN

BEFORE THE
ANTITRUST, MONOPOLIES AND
BUSINESS RIGHTS SUBCOMMITTEE OF THE
SENATE JUDICIARY COMMITTEE

October 6, 1987

Thank you, Senator Metzenbaum, for the invitation to appear before this Committee. I am pleased to have the opportunity to discuss how we believe the public will benefit from ESPN's televising NFL football games to viewers throughout the nation.

As you may be aware, ESPN is an advertiser-supported sports television service. It is the country's most widely distributed cable television programming service and is provided to viewers as part of the basic cable television package by all participating cable television systems. ESPN programming is presently provided to approximately 44 million households in the United States. It is also seen in 26 foreign countries and is broadcast over the Armed Forces Television Network.

In the past year, ESPN has broadcast over 3800 hours of programming covering more than 50 different sports. That is more than twice the number of hours of sports programming broadcast by ABC, CBS and NBC combined. Among the events ESPN has covered are the Americas Cup, the Stanley Cup, CFA Football, NCAA Basketball Playoffs, Davis Cup Tennis, the U.S. Open, PGA and British Open Golf Tournaments and the U.S. Olympic Festival.

As the leading television sports programmer, ESPN has for some time been very interested in NFL football. Thus, in anticipation of the expiration of the NFL's television contracts earlier this year, ESPN made clear to the NFL that it would be interested in negotiating for any television package that the League might offer to it for the coming seasons.

As you know, the NFL decided earlier this year to create a fourth television package, in addition to the traditional Sunday afternoon and Monday night packages. This fourth package was to consist of games played on Sunday nights. This package did not diminish either the number of games played on Monday nights or the number of games televised nationally on Sunday afternoons. Instead, it made available for national television on Sunday nights games at least some of which would otherwise have been broadcast regionally on Sunday afternoons.

We were delighted to have the opportunity to bid for an NFL television package, and after a period of negotiations the

League accepted our offer for the Sunday night package. Our contract with the NFL runs for three years, for the 1987, 1988 and 1989 seasons. By contrast to the three network television packages, which consist of from 16 to 100 regular season games, as well as various post-season games, each year, ESPN will be televising only eight regular season games each season -- less than 4 percent of the NFL's regular season schedule. ESPN will also televise four preseason games and the Pro Bowl each year. ESPN's package does not include any of the NFL playoff games or the Super Bowl.

In order to ensure that the Sunday night games will be available to all the fans in the cities of the participating teams, we agreed to make those games available to over-the-air television stations in the home markets of each of the participating teams on the same basis as they are available in those markets when telecast on the over-the-air networks. As a result, our NFL telecasts can be seen, not only by virtually all of the 44 million homes reached by ESPN, but also by almost every viewer in the areas where the games are of the most interest.

It is of course true that ESPN telecasts are not available on over-the-air television outside the markets of the participating teams. Nevertheless, we believe that ESPN's participation in NFL football will increase the availability of NFL games to television viewers throughout the country. In many

cases, the games televised by ESPN will be available to a larger part of the country, and will be seen in more homes, than would have been the case if those games had been included in the over-the-air network packages. The reason is this: Most of the CBS and NBC games are broadcast only on a regional basis, sometimes not much beyond the cities of the participating teams, and are therefore available to only to a limited number of viewers. By contrast, all games televised by ESPN will be available to virtually all of the 44 million households served by our affiliates throughout the nation, plus the additional homes receiving the over-the-air telecasts in the participating teams' home markets.

In sum, we believe that ESPN's participation in the televising of NFL football has been good for competition and the public. It reflects enhanced competition for television rights, provides a new outlet for advertisers who wish to sponsor NFL telecasts, and increases the availability of NFL football to television viewers. ESPN is pleased to participate in that process.

Senator SPECTER. The last witness will be Professor Stephen F. Ross from the University of Illinois, College of Law.

Professor Ross, welcome back to the Senate Judiciary Committee. Thank you for being available to advise us on this important issue. We welcome you here. I need not tell you that your full statement will be made a part of the record. I need not tell you about the desirability of an abbreviated statement, so proceed.

STATEMENT OF STEPHEN F. ROSS, ASSISTANT PROFESSOR, UNIVERSITY OF ILLINOIS, COLLEGE OF LAW, CHAMPAIGN, IL

Professor Ross. Thank you very much, Senator Specter. It is a pleasure to be back, and it is a thrill to be on this side of the green cloth.

Let me just note for your interest, Senator, that I did some calculations and in your State of Pennsylvania over 2.3 million homes in the Erie, Harrisburg, Johnstown, Philadelphia, Pittsburgh and Scranton/Wilkes-Barre markets are not wired for cable. Either they cannot receive ESPN, or the people have chosen not to. In order to see these NFL games, they either just cannot or would have to pay for them. So I think it is appropriate that you have shown concern about this issue.

Senator SPECTER. On that point, Mr. Ross, how many? 2.3 million homes do not have cable available?

Professor Ross. Are not wired for cable in those six major media markets in Pennsylvania. So either they cannot because, as you said, in Philadelphia they do not have cable available, or they choose not to right now, and if they are real football fans might be forced to pay for cable simply in order to receive the ESPN games if there is cable in their area.

Senator SPECTER. Well, they have to pay for cable to get ESPN.

Professor ROSS. That is right.

Senator SPECTER. Thank you.

Professor Ross. Both Senator Metzenbaum and Senator Hatch, in their opening remarks, expressed what is the key issue in terms of their own antitrust analysis that is, whether viewership is lower because of the ESPN contract than it would otherwise be if that contract were held to be illegal. What is important to get from the Justice Department and the Federal Trade Commission is some indication that this issue is what they are looking at.

Commissioner Rozelle implied in his testimony that the major networks and Fox were simply not interested in the eight special games; either they were not interested at all or the bid was so low that if the ESPN contract were held to be illegal, the network would have just folded those games into the Sunday package. If Commissioner Rozelle is right, then the ESPN package will increase viewership because it will give fans an option to pay for games nationwide that they otherwise would not be able to see at all.

That is something that should be easily verifiable. I notice in your resolution you generously gave the agencies 120 days to find this out. It strikes me that this is something that they could find out in one day of deposition testimony with the appropriate documents.

But the important point, and I think the benefit of these hearings, is that public viewership should be the focus of inquiry. I understand there are some other concerns they have about competition in the general television market, but that should not be the principal concern. Art Modell from the Browns testified that Fox rejected the offer. That is another thing that should be focused on, should be easily verifiable, and then you and the American people can be satisfied that this contract benefits viewers.

As far as your question about what assurances can be given that this will not be the camel's nose under the tent, there is a very simple assurance: If the Justice Department and the Federal Trade Commission carries out this very brief inquiry and determines that this contract will increase viewership, then they are letting everyone know that the next contract will be looked at with the same inquiry. And if, for example, the NFL would move the playoff games to ESPN, the enforcement agencies would conduct the same inquiry. It can be easily determined if viewership will be reduced, and then everyone will be on notice that the antitrust agencies will do their job and challenge the agreement and prevent it from being carried forward under the antitrust laws.

Senator SPECTER. So you see a certain amount of therapy in the inquiry?

Professor ROSS. I think so. I think it puts everybody on notice; it lets people know what the proper standard is. It is not clear to me that there is widespread agreement that that should be the proper standard, and if the agencies are not going to establish viewership as the proper standard, that is something that Congress has to know, because then corrective legislation might be necessary.

As I wrote in my prepared testimony, I believe legislation is inappropriate right now. I was pleased to see that your resolution was in a sense the Senate resolution and not an attempt like the Federal Communications Commission's previous effort to regulate this area.

Senator SPECTER. You think we were well advised to have a Senate resolution instead of a legislative proposal?

Professor ROSS. At this point I think that is right, because the antitrust laws will work if they are enforced properly. And it is just really a simple matter of getting the antitrust agencies to reaffirm the fact that this contract is subject to the antitrust laws and not exempt under the Sports Broadcasting Act, and to take a quick look to see what is the effect on viewership. And if the effect on viewership is to help fans, I think everyone is happy. If the effect on viewership is to increase prices for the benefit of the NFL but reduce viewership, then I think that the agencies can and should take quick action. It is really just a simple matter of your performing the oversight responsibility that the Judiciary Committee is entrusted to to make sure they do their job.

Senator SPECTER. Well, that is very cogent and, I think, very much the point, and that is precisely what we are looking for. We want to see what the effect will be on viewership, and we want to put people on notice that this Committee is going to be interested in what is going to happen in the future. The current arrangement is a relatively minor one, but it has the potentiality for being a very major diversion to lead to pay television.

Professor Ross. If I could make one more remark, Senator. Senator Hatch, while indicating his agreement that the focus should be on viewership, did mention, that he thought that as long as all the networks and all the cable were free to openly bid and freely bid, that the interests of the viewers would be protected. That is just not necessarily true.

My data may be old, but certainly as of a few years ago, advertisers were willing to pay approximately 15 to 20 cents per viewer for National Football League games. Now, HBO certainly could charge a lot more than 15 to 20 cents for NFL games, and so they would be in a position in free and open bidding to make a higher bid than the network for certain desirable games, and that would be free and open competition with the league package. But it would not be in the interest of the viewer.

So I think it is important to keep the focus on viewership and recognize that there is a real potential for concern here, unless the focus is on the bottom line, which is the American football viewing fan.

Senator SPECTER. Well, would there be any violation of law, Professor Ross, if HBO made such a bid and it was turned down by the NFL?

Professor Ross. Oh, not at all.

Senator SPECTER. Do you have any speculation as to where this field is going?

Professor Ross. Well, frankly, I think that how much light is shed based on these hearings and what the enforcement intentions of the Justice Department are will play a very large role in where this is going. If the Justice Department states right now that they are going to be focusing on viewership, the National Football League is going to realize that if they want to make a wholesale shift to cable, or, for that matter, if baseball and basketball want to move the games that are now on free TV to cable, they are going to have to contend with an antitrust problem. Maybe they will be back here seeking an exemption, but they are going to realize that there is a problem.

Senator SPECTER. Absent any action by the FTC and congressional oversight, if the market factors were allowed to play out with any view by the Congress or the Justice Department or the FTC, where do you think it might go?

Professor Ross. I think there is a very good chance that you are going to see more and more important games that fans now watch for free that they will be forced to pay for.

Senator SPECTER. And if we have appropriate inquiries and oversights, where do you think we will head?

Professor Ross. I think with oversight you can either make sure that the Justice Department is doing its job, or, if they are not, corrective legislation might be necessary and that can prevent that.

Senator SPECTER. And if the Justice Department does its job, then what will the consequence be?

Professor Ross. I think the consequence of effective law enforcement by the Justice Department will be that games which are now seen on free TV, where the economic support of free TV, will remain on free TV.

Senator SPECTER. Thank you very much, Professor Ross.

[Whereupon, at 11:50 a.m., the subcommittee was adjourned.]

[The statement of Professor Ross follows:]

SPORTS BROADCASTING, ANTITRUST, AND PUBLIC POLICY

Testimony Before the

Subcommittee on Antitrust, Monopolies and Business Rights

Committee on the Judiciary

United States Senate

October 6, 1987

Stephen F. Ross

University of Illinois

College of Law

Champaign, IL

I would like to thank the subcommittee for the opportunity to appear before you to discuss an issue of great importance to millions of football fans -- the shift of regular season National Football League games to the pay cable Entertainment and Sports Programming Network (ESPN). I appear here at the request of Chairman Metzenbaum and Senator Specter to offer my personal views on the antitrust and public policy issues involved in this shift. These issues are covered in courses I teach at the University of Illinois College of Law in antitrust law, government regulation, and sports law. In addition, my current scholarship focuses on the application of antitrust law to professional sports leagues. I represent no group, although I hope to speak for a constituency otherwise unrepresented by witnesses at today's hearing -- football fans.

The key points I would like to make today are: (1) congressional policy should ensure that the American people not be forced to pay for football games they could otherwise watch for free; (2) new regulatory approaches to achieve this policy are unnecessary and probably would be ineffective; (3) properly enforced, the antitrust laws will protect consumers from efforts to force them to unnecessarily pay to see NFL football games; (4) vigilant congressional oversight plays an important role in encouraging a careful analysis of the NFL-ESPN contract by the Department of Justice and the Federal Trade Commission in order to determine whether this shift to cable helps or hurts football fans.

I. CONGRESSIONAL POLICY SHOULD PROTECT THE AMERICAN PEOPLE FROM BEING FORCED TO PAY FOR GAMES THEY COULD OTHERWISE WATCH FOR FREE.

Our democratic, free enterprise system is centered around the belief that public economic policy should promote the welfare of the people of this country, rather than a few wealthy team owners or television magnates. This policy is reflected in our antitrust laws, which are designed to protect consumers from the higher prices, lower output, and transfer of wealth from consumers to producers that result from monopolies and conspiracies in restraint of trade.[1] It is also reflected in the Communications Act and related laws that regulate the television industry in the public interest. Finally, each of you recognize the political need to represent your constituents -- and for all of you, there are more voters who are football fans than league or television network owners.

The courts have also recognized the public interest in protecting fans from shifts of games that could be seen on free television to pay cable. As I will detail in a moment, the regulatory efforts by the Federal Communications Commission in this area were struck down as excessively clumsy. However, a policy that "seeks only to channel movie and sports material to its intended recipients over broadcast television, rather than

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[1] See Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L. J. 65 (1982).

pay cable, whenever the economics of advertiser-supported programming permit" is an important governmental interest sufficient to satisfy strict First Amendment standards.[2]

Congress enacted the antitrust laws to ensure a system of free competition providing the lowest prices and the greatest output of desired goods and services for the American consumer.[3] If the NFL currently faced competition from an independent rival, such as the old American Football League, the NFL would think twice before shifting games to ESPN and risking losing viewers and ratings to an AFL pledging to keep games on free television. But the AFL is not around, because the antitrust laws were suspended in 1966 when Congress allowed the NFL-AFL merger.[4] Thus, it is particularly important that Congress show concern for fans to ensure that they can continue to receive the greatest number of football games at the lowest possible price.

II. NEW LEGISLATION IS UNNECESSARY AT THIS TIME.

However, I urge you not to manifest your concern by passing any new legislation at this time.[5] As I demonstrate in Part III of my testimony, the antitrust laws currently on the books should

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[2] Home Box Office v. FCC, 567 F.2d 9, 49 (D.C. Cir. 1977).

[3] This view of the antitrust laws is shared by writers across the spectrum of antitrust ideology.

[4] Pub.L.No. 89-800, Sec. 6(b)(1), 80 Stat. 1515 (1966).

[5] By "new legislation," I mean legislation directed at the particular problem raised by the NFL's contract with ESPN. One effect of broad legislation repealing the 1966 merger legislation and reorganizing the NFL into competing leagues might be to reduce the incentive for any league to shift games to pay cable, but such legislation is far beyond the scope of today's inquiry.

adequately protect consumers from harm. Moreover, regulatory attempts to protect fans will probably be unsuccessful.

Sound public policy should preserve free broadcast of those games which would, in the absence of regulation, be on free television. It should also allow or encourage leagues to telecast other games on cable. Thus, such a policy should maximize the number of games fans can watch on free television, while allowing fans the option of seeing even more games on cable if they wish to pay to do so.

The principal problem with any regulatory solution is the difficulty as a general matter in predicting which games a league would show on free television if restricted to that medium, and which games will only be televised if the league is allowed to charge for the program. In 1975 the FCC attempted to protect sports programming from being "siphoned" to cable by adopting a complex regulation. The regulation was struck down by the Court of Appeals as improperly tailored to the stated concern with "siphoning."[6] For example, if the Washington Bullets had televised 40 of their 80 games on local television, the FCC rules prohibited the cablecast of more than 20 games. This regulation

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[6] First Report and Order, 52 F.C.C.2d 1 (1975), vacated sub nom. Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977).

Under the regulation, if no more than 25% of a league's games had been televised in the previous five years, then the number of cablecasts could not exceed the number of games not televised in the prior year with the most telecasts. If more than 25% of a league's games had been televised, then the number of cablecasts could not exceed 50% of the number of games not televised in the prior year with the most telecasts. Home Box Office, 567 F.2d at 19 n.8.

was both overbroad and underinclusive. It required that 20 games remain untelevised, even if cable patrons were willing to pay to view those games. And it did nothing to ensure that the 20 games which could be cablecast were not 20 of the most exciting Bullet games, contests which were previously shown on free television. I suspect that similar efforts to regulate today would run into a host of problems.

III. PROPERLY ENFORCED, THE ANTITRUST LAWS WILL PROTECT CONSUMERS FROM EFFORTS TO FORCE THEM TO UNNECESSARILY PAY TO SEE NFL FOOTBALL.

Even if it were possible to draft a narrowly tailored rule to prevent siphoning, such regulation is unnecessary. The antitrust laws already provide adequate protection for consumers. Properly applied, they prevent NFL clubs from agreeing with each other to shift games to cable if, but only if, such a shift would reduce the number of fans watching NFL games.

A. The Sports Broadcasting Act does not apply.

Of course, the antitrust laws will protect consumers only if those laws apply to the NFL's contract with ESPN. A literal reading of the Sports Broadcasting Act of 1961 may suggest that the contract is exempt from the antitrust laws. The Sports Broadcasting Act provides that the antitrust laws shall not apply to any NFL contract to sell or otherwise transfer "all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football" conducted by the league.[7]

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[7] 12 U.S.C. 1291 (emphasis added).

ESPN programming is supported in part by sponsored advertising; thus if "telecast" includes broadcasting over cable, the NFL-ESPN contract appears literally to fall within the terms of the exemption.

However, the legislative history demonstrates that this is not the case. I need not remind a panel of legislators of the importance of legislative history in interpreting a statute. Who among you have not had your concerns about the text of a proposed bill assuaged by the sponsor with assurances that modifying language will be inserted in a committee report or colloquy? The Supreme Court also has recognized that even unambiguous legislative language will be modified to permit a statute to be construed in light of congressional intent as expressed in clear legislative history.[8]

The House Committee Report makes clear that the narrow purpose of the Sports Broadcasting Act exemption was to permit the NFL to sell a package of league games to CBS, just as the rival AFL had sold a package to ABC.[9] The record established that a package sale was necessary to assure that all road games would be televised back to the home area of NFL franchises. Thus, the House Judiciary Committee concluded that "the public interest in viewing professional league sports warrants" an

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[8] Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 96 S.Ct. 1938 (1976).

[9] Telecasting of Professional Sports Contests, H.Rep.No. 1178, 87th Cong., 1st Sess. at 2.

accommodation "with minimal sacrifice to antitrust principles."[10] Under the circumstances, Congress acted to promote, not restrict, viewership of games -- especially the games fans care about the most, those of their local team. In contrast, as I examine in Part IV below, a contract shifting games to cable television could potentially cause a significant lessening in game viewership with no corresponding benefit to local fans. Moreover, the House Antitrust Subcommittee was assured by the NFL Commissioner that the proposed exemption did not apply to shifts to cable. The subcommittee's counsel asked if Commissioner Rozelle understood "that this bill covers only the free telecasting of professional sports contests, and does not cover pay TV." The Commissioner responded, "Absolutely."[11]

As a final note on the application of the exemption, the NFL subsequently has conceded in congressional testimony that the 1961 Act does not apply to games shown on pay cable. In answer to a question by Senator Specter at a 1982 Judiciary Committee hearing, NFL Counsel Paul Tagliabue unequivocally stated that "the words sponsored telecasting in [the 1961 Act] were intended to exclude pay and cable. That is clear from the legislative history and from the committee reports. So, that statute does not authorize us to pool and sell to pay and cable."[12]

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[10] Id. at 3.

[11] Hearings on Telecasting of Professional Sports Contests, House Antitrust Subcommittee 36 (1961).

[12] Hearings on Professional Sports Antitrust Immunity, Senate Committee on the Judiciary 41 (1982).

Courts have held that antitrust exemptions are to be narrowly construed.[13] Given the clear congressional purpose to increase viewership and the NFL's unequivocal concession, it is unlikely that a court will construe the Sports Broadcasting Act to cover the NFL-ESPN agreement. Of course, given the strong public policies discussed in Part I, I would urge quick and immediate passage of corrective legislation should my prediction prove inaccurate.

B. Antitrust doctrine will properly examine the NFL-ESPN agreement under the rule of reason.

Antitrust law often has condemned agreements among competitors -- such as the NFL agreement to pool their broadcast rights -- by adopting a standard of per se illegality. However, the first antitrust decision concerning broadcast rights recognized that the special needs of professional sports leagues required more careful analysis.[14] Although lower courts occasionally have strayed from this wisdom,[15] the Supreme Court has recently reaffirmed that most sports league arrangements are to be reviewed under the rule of reason.

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[13] See, e.g., Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 127, 102 S.Ct. 3002, 3007 (1982). In another context, the literal language of the Act has been disregarded in light of clear legislative history prohibiting agreements with the intent or effect of excluding rival leagues from any network. USFL v. NFL, 634 F.Supp. 1155 (S.D.N.Y. 1986).

[14] United States v. NFL, 116 F.Supp. 319 (E.D.Pa. 1953).

[15] See, e.g., Board of Regents of the Univ. of Oklahoma v. NCAA, 546 F.Supp. 1276 (W.D.Okla. 1982); Id. 707 F.2d 1147 (10th Cir. 1983); Smith v. Pro-Football, Inc., 420 F.Supp. 738 (D.D.C. 1976).

In the NCAA case,[16] the court noted that the professional sports industry is one "in which horizontal restraints on competition are essential if the product is to be available at all." As the NFL successfully argued before Congress in 1961, some agreements can increase output (the number of viewers able to watch NFL games) even if they restrict the rights of individual teams. For example, by offering a package deal to a network, a league can secure a promise to televise all road games of each team back to local markets.[17]

C. The key focus under the rule of reason is the effect on output.

Ultimately, however, the Court condemned the NCAA's package sale of college football television rights to two networks and one cable superstation.[18] The Court found dispositive the district court's holding that, absent the agreement, many more games would be shown on television. Because prices were higher and outputs lower "than they would otherwise be," the agreement was anticompetitive and thus illegal under the rule of reason.[19]

In focusing on output, the Supreme Court considered the

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[16] NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 104 S.Ct. 2948 (1984).

[17] Hearings on Telecasting of Professional Sports Contests, House Antitrust Subcommittee 39-40 (1961)(testimony of Pete Rozelle).

[18] The question whether the Sports Broadcasting Act applied to the NCAA contract with the WTBS superstation did not arise because college football is not within the scope of 12 U.S.C. 1291.

[19] NCAA, 468 U.S. at 107.

number of games that would be shown on television as a proxy for total viewership. This surrogate should usually be correct. However, where an agreement shifts games to cable, the result will clearly be less viewership even if the same number of games are televised. ESPN has made great strides in a short period of time. However, by my estimate over 50 million American homes still do not receive ESPN.[20] And, of course, this service must be paid for by the consumer.[21]

The following table demonstrates the limited cable

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[20] A recent survey showed that ESPN reached 38.5 million homes. Channels, 1987 Field Guide, at 73. This just exceeds 40% of all homes with television sets. See Channels, 1986 Field Guide at 55 (total cable penetration was 39 million homes, or 43.7% of those with TV sets). From this data, I calculate that there are over 89 million homes with television sets.

[21] In addition to the shift of existing games to cable, in two other situations the proxy of games for viewership is also incorrect. If televised games so destroyed the live gate of marginal teams that the entire league may be jeopardized, a reduced number of televised games would result in the league's continued operation, while an unrestricted number would result in a league's demise. Under these circumstances, total viewership (television and in person) would be enhanced by a reduced number of games. This was the basis for Judge Grim's 1953 decision permitting NFL teams to jointly agree to blackout televising games in a territory when the local team was playing at home. United States v. NFL, 116 F.Supp. 319 (E.D.Pa. 1953).

Some leagues have also found that televising a large number of games so saturated the audience that viewership declined despite the increased number of games. League officials have speculated that when there are so many league games on television, people tend to postpone their viewing and end up watching fewer games. Thus, the NBA reduced the number of games in their national package but found that the ratings on the remaining games had substantially increased so that more people actually watched NBA basketball under the more restrictive plan. See Interview with David Stern, NBA Commissioner, Antitrust 25-26 (Summer 1987).

Neither situation is applicable here.

penetration estimates (using 1986 data)[22] in selected television markets:

Wilmington, DE	49%
Boston, MA	49%
Charleston-Huntington, WV	67%
Cleveland, OH	45%
Tuscon, AZ	46%
Burlington,VT-Plattsburgh,NY	51%
Birmingham, AL	52%
Chicago, IL	31%
Columbia, SC	47%
Salt Lake City, UT	35%
Cheyenne,WY-Scottsbluff,NE	73%
Des Moines, IA	46%
Philadelphia, PA	45%

Thus, even if fans were willing to pay significant sums of money to watch games they now watch for free, many will be unable to do so.

Does this mean that the NFL-ESPN contract violates the antitrust laws? Not necessarily. The Supreme Court identified as a fatal flaw in the NCAA plan the fact that output was "lower than [it] would otherwise be." The key issue, therefore, is whether viewership is lower because of the ESPN contract than it

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[22] Source: 1987 Cable and Station Coverage Atlas, from Arbitron estimates. No listings were provided for markets in certain states, including New Hampshire.

would otherwise be if that contract were to be held illegal.

Because many fans cannot receive cablecasts in their homes, viewership this season will obviously be "lower than it would otherwise be" if selected Thursday and Sunday night games were shown on ABC or another national network instead of ESPN. Thus, if the NFL had decided to sell rights to these selected games to the highest bidder, which turned out to be ESPN, I would conclude that the contract is illegal. The NFL has jointly agreed to raise its price and reduce its viewership, exactly what the NCAA did in its unlawful television plan.

But the NFL is, of course, under no obligation to show games on any particular network, or to schedule Thursday or Sunday night special games at all. Suppose internal documents reveal that network offers for the selected games were unacceptably low, and that, in the absence of an offer from ESPN, the NFL would have eliminated this mini-package of games, and gone back to a schedule of 15 Sunday afternoon games and one Monday night game. (Presumably, CBS and NBC would be willing to pay slightly more for this one extra game than they currently pay.) In such a scenario, what would "otherwise be" would be no nationally televised games on selected Sunday and Thursday evenings. The ESPN contract, under this scenario, gives fans the option of paying for a nationally televised game they could not otherwise see. In this case, the ESPN deal increases output, and thus is pro-competitive.

IV. VIGILANT CONGRESSIONAL OVERSIGHT CAN PERFORM AN IMPORTANT ROLE IN PROTECTING FANS.

Because of the strong public interest in this issue, congressional oversight and monitoring of antitrust enforcement by the Department of Justice and the Federal Trade Commission is certainly worthwhile. These agencies should be requested to investigate the issues raised by the contract, and determine whether the effect of the shift to ESPN is a positive one that preserves, at least for some viewers, nationally televised games that otherwise would not be offered--or in contrast is a negative one that allows the NFL to enrich itself through higher contract fees at the expense of millions of Americans who do not choose to pay for or cannot receive cable television.

Within six months, the agencies should be able to report to you on whether they have an active, law enforcement investigation pending against the NFL and ESPN. If so, due process and separation of powers concerns suggest that any further oversight should await completion of the investigation. If not, further oversight hearings should be scheduled and the agencies requested to supply to this subcommittee the data they have uncovered so that you and the American people may determine whether the contracts are legal and in the public interest. It is imperative that the agencies' enforcement intentions be publicized soon. If they choose not to adopt an analysis based on viewership, the NFL could use the ESPN deal as the proverbial "camel's nose into the tent," leading to wholesale shifts of games to cable. Corrective legislation may then be necessary.

Again, thank you for allowing me the opportunity to share my views with you on this issue of considerable importance to millions of football fans across the nation.

APPENDIXES

United States Senate

APPENDIX A

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

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November 20, 1987

The Honorable Charles F. Rule
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Rule:

We are writing to request that the Antitrust Division of the Department of Justice study and report to the Antitrust Subcommittee of the Senate Judiciary Committee on the National Football League's telecasting practices.

As you may know, on September 29, 1987, Senator Specter introduced S. Res. 291 calling for the Antitrust Division to study and report to Congress on issues relating to the NFL's telecasting practices. Specifically, the resolution called for a study of (1) the implications of new technology, specifically cable television and pay-per-view television services, on the application of existing antitrust laws to the telecasting practices of the NFL, and (2) the effect on the antitrust status of current NFL telecasting practices of the merger of the League's cable television partner with one of the major broadcast networks.

The Antitrust Subcommittee held a hearing on S. Res. 291 on October 6, 1987. We believe that this hearing clearly demonstrated the need for additional study and that the Antitrust Division has the appropriate expertise and experience to undertake such a study.

Accordingly, we request that the Antitrust Division undertake the study called for by S. Res. 291 and report its conclusions to the Antitrust Subcommittee within 120 days. The report should include a statement of the Division's antitrust enforcement plans with respect to the NFL's telecasting practices.

If you have questions regarding this request, please

contact Mary Louise Westmoreland (224-5701) or Jeffrey Robinson (224-6791) of the Judiciary Committee staff. Thank you very much for your cooperation in this matter.

Sincerely,

Arlen Specter
United States Senator

Howard M. Metzenbaum
United States Senator

APPENDIX B

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MAR 30 1988

Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies
and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to your November 20, 1987, letter requesting the Antitrust Division to study and report to the Subcommittee on the telecasting practices of the National Football League (NFL). Both your letter and the Subcommittee's October 6, 1987, hearing indicate particular interest with regard to the NFL's agreement with the Entertainment and Sports Programming Network (ESPN), a cable televison service, for ESPN to carry a number of NFL games on Sunday nights. More generally, you are interested in the question whether the antitrust exemption contained in the Sports Broadcasting Act covers agreements between sports leagues and those entities such as ESPN that carry league games via cable or some other means different from traditional over-the-air, "free" TV. Your inquiry raises a basic issue of how best to apply a statutory antitrust exemption in the context of an evolving industry.

Background

The NFL-ESPN contract covers the 1987-1989 seasons and provides that each season ESPN will carry 1 regular season game on each of 8 Sunday nights, 4 preseason games, and the Pro Bowl (the league's all-star game). The contract requires every game carried by ESPN to be simultaneously offered for telecast to a broadcast TV station in the home city of the visiting team, and, if the game is sold out in advance, in the city of the home team. All other NFL regular season games remain with the three major television networks. All Sunday afternoon games continue to be televised by CBS and NBC--most regionally and some nationally--and the one Monday night game per week

continues to be televised nationally by ABC. Post-season playoff games, including the Super Bowl, also remain on network TV.

It is our understanding that ESPN is provided to viewers by participating cable television systems as part of "basic cable," for which cable subscribers pay a monthly fee. ESPN, which is currently provided to approximately 44 million households in the United States, receives a portion of its revenues from advertising and a portion from fees paid by cable systems.

The Sports Broadcasting Act ("the Act"), 15 U.S.C. §§ 1291-95, exempts from the antitrust laws joint agreements among professional sports teams within a league (football, baseball, basketball, hockey) selling the rights for "sponsored telecasting" of games. 1/ The Act was enacted in response to a 1961 judgment that prohibited the NFL from granting telecasting rights to CBS on behalf of all teams. See United States v. National Football League, 196 F. Supp. 445 (E.D. Pa. 1961). 2/ The purpose of the Act was to enable the member clubs of a professional sports league "to pool their separate rights in the sponsored telecasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network, without violating the antitrust laws." H.R. Rep. No. 1178, 87th Cong., 1st Sess. 2 (1961); S. Rep. No. 1087, 87th Cong., 1st Sess. 1 (1961).

1/ The exemption has two principal limitations. First, it does not cover agreements that restrict the area into which a game may be telecast except to protect a team playing at home. 15 U.S.C. § 1292. Second, the exemption does not cover agreements that permit professional football telecasts on Friday nights or Saturday afternoons during the high school and college football seasons. 15 U.S.C. § 1293.

2/ The court found that the CBS/NFL contract in question violated a 1953 judgment that prohibited the NFL and its teams from entering into any agreement "having the purpose or effect of restricting the areas within which broadcasts or telecasts of games . . . may be made." The 1953 judgment had been entered after the court found that an agreement among league members restricting the televising of games into an NFL city on a day when the team located in that city was playing on the road constitued a violation of Section 1 of the Sherman Act. United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953).

The legislative history of the Sports Broadcasting Act reveals that Congress was concerned that a sports league--and in particular, the NFL, which was the only league subject to the 1961 judgment--be able to assure an adequate amount of television coverage and income to its member teams that had limited local television markets, on a basis of substantial equality with the stronger clubs. Otherwise it was feared that the financial weakness of some teams in a league could imperil the league's continued operation. H.R. Rep. No. 1178, 87th Cong., supra, at 2-3; S. Rep. No. 1087, 87th Cong., supra, at 1-3. Congress concluded that "the public interest in viewing professional league sports warrants some accommodation of antitrust principles . . . ." H.R. Rep. No. 1178, supra, at 3; S. Rep. No. 1087, supra, at 3.

Analysis

The question that arises under the Sports Broadcasting Act with regard to the NFL-ESPN agreement (and other agreements between a sports league and someone presenting games to television viewers by means other than traditional over-the-air "free" television) is whether the agreement is for "sponsored telecasting" within the meaning of 15 U.S.C. § 1291. If what is involved is not "sponsored telecasting," the Act's antitrust exemption does not apply. Failure to come within the meaning of "sponsored telecasting" does not make an agreement illegal--it merely means that the agreement is subject to the antitrust laws, as is most commercial conduct.

In construing the term "sponsored telecasting," which is not defined in the Act, we begin by recognizing the settled rule that exemptions to the antitrust laws are to be construed narrowly. 3/ The Supreme Court has, in construing a variety of statutory antitrust exemptions, recognized and applied the rule of construing such exemptions narrowly. See, e.g., Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979) (McCarran-Ferguson Act); Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11-14 (1976) (Nonprofit Institutions Act); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973) (§ 15 of the Shipping Act); United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956) (Miller-Tydings Act and McGuire Act).

3/ See, e.g., Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed . . . . This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions.").

Our analysis is also aided by in general the legislative history of the Act and in particular two statements that, while not going into detail on the meaning of "sponsored telecasting," do give some indication as to what Congress intended. First, the House Report, noting that the exemption applies to the sale of rights in the sponsored telecasting of games, states: "The bill does not apply to closed circuit or subscription television." H.R. Rep. No. 1178, supra, at 5. Second, in an exchange between NFL Commissioner Rozelle and the chief counsel to the Antitrust Subcommitee of the House Judiciary Committee, Commissioner Rozelle was asked: "You understand, do you not, Mr. Rozelle, that this bill covers only the free telecasting of professional sports contests, and does not cover pay TV?" Commissioner Rozelle responded: "Absolutely." Telecasting of Professional Sports Contests: Hearing Before the Antitrust Subcomm. of the House Judiciary Comm., 87th Cong., 1st Sess. 36 (1961). Our reading of these two statements in the legislative history is that Congress was, by using the term "sponsored telecasting," trying to distinguish between advertiser-supported programming (such as traditional over-the-air TV) that is in a sense "free" to viewers and viewer-supported programming (such as the closed circuit and subscription television that existed in 1961 and is referenced in the House Report).

ESPN does not fit neatly into this dichotomy. It is something of a hybrid, deriving a portion of its revenue from the sale of advertising and a portion from cable systems that resell it and thus indirectly from the monthly basic cable fee paid by cable subscribers. 4/

Congress in 1961 could not of course have foreseen the changes that have occurred in technology and in the marketplace for delivering television programming. ESPN (as well as other cable program services) and other options available today for receiving programming were not then in existence. In view of the evolution of the industry, it is thus not surprising that the term "sponsored telecasting," even if clear in 1961, has some ambiguity as applied today.

While we believe there is some question as to whether programming such as ESPN's NFL games that is partly supported by advertisers and partly by viewers is "sponsored

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4/ While cable viewers do not pay a separate charge to receive ESPN, they cannot receive ESPN via cable without paying the cable operator's monthly fee for basic service.

telecasting," 5/ our view is that it is not and thus does not come within the Act's exemption. This conclusion is consistent with Commissioner Rozelle's agreement with Subcommittee counsel in 1961 (quoted above) that the legislation covers "only the free telecasting" of games.

Our conclusion is also consistent with the settled rule that antitrust exemptions are to be construed narrowly. Where the evolution of an industry has rendered the wording of a statutory antitrust exemption ambiguous as applied to new situations, there are basically two approaches toward construing the exemption. First, the exemption can be construed narrowly, as covering only those situations that Congress clearly had in mind when it created the exemption. Second, the exemption can be construed more broadly by attempting to determine whether the Congress that created the exemption would have exempted the conduct in question had it been able to foresee the industry's evolution and thus consider that conduct. We believe that the narrow construction is both required by the Supreme Court cases cited above and preferable on policy grounds. Where Congress, through a statutory antitrust exemption, has created an exemption to that policy for certain practices of an industry, Congress can, if it sees fit to do so, update or expand the exemption that it created in order to meet new and unforeseen situations.

We emphasize again that a conclusion that certain conduct (such as the NFL-ESPN agreement) is not exempt from the antitrust laws does not make such conduct presumptively unlawful and means only that such conduct is subject to those laws. While we have concluded that the NFL-ESPN agreement is not exempt under the Sports Broadcasting Act, we have not found cause to investigate that agreement under the antitrust laws. The Antitrust Divison's general standards for conducting a formal investigation require both that the facts presented appear to support a legal theory of an antitrust violation and that the investigation not duplicate other efforts, including those of the Federal Trade Commission. It is our understanding that the Federal Trade Commission has an investigation underway that is looking at the facts and circumstances surrounding the NFL-ESPN agreement. Based upon our review, we do not believe the facts warrant inquiry into competitive issues beyond those under consideration by the FTC.

5/ The question arises of how much advertiser support (or how little viewer support) is enough to satisfy the exemption. There seems to be no definitive answer.

I hope that this letter is responsive to your inquiry. Your interest in this matter and in the enforcement of the antitrust laws is greatly appreciated.

Sincerely,

Charles F. Rule
Assistant Attorney General

APPENDIX C

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

18 APR 1988

Honorable Arlen Specter
Subcommittee on Antitrust, Monopolies
and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

During the Subcommittee's March 31 hearings, you asked about the investigation of the NFL-ESPN contract that the Antitrust Division undertook in response to the recent inquiry from yourself and Chairman Metzenbaum. Your letter of November 20, 1987, to which I responded on March 30, 1988, concerned both the NFL-ESPN contract and the more general question whether the antitrust exemption contained in the Sports Broadcasting Act covers agreements between sports leagues and entities such as ESPN that carry league games via cable or some means other than traditional over-the-air, "free" TV. This letter responds to the questions you raised at the March 31 hearings.

As you know, the NFL-ESPN contract calls for ESPN to carry eight Sunday night NFL games during each of three seasons. The contract requires those games to be simultaneously offered to a broadcast TV station in the home city of the visiting team, and in case of a sell-out, in the city of the home team. All other regular season games and all post-season playoff games remain with the three major television networks.

In order to respond to your November 20, 1987 inquiry, the Antitrust Division reviewed the NFL's television and cable contracts and pertinent league by-laws. We also met with counsel for the NFL and counsel for ESPN.

As detailed in my letter of March 30, the Antitrust Division concluded that the NFL-ESPN agreement is not exempted from the antitrust laws by the Sports Broadcasting Act. At the same time, we did not find cause to investigate that agreement further under the antitrust laws. The Antitrust Division's general standards for conducting a formal investigation require both that the facts presented appear to support a legal theory of an antitrust violation and that the investigation not duplicate other efforts, including those of the Federal Trade Commission. Indeed, in order to coordinate investigations and avoid duplicative or overlapping investigations, the Antitrust Division and the FTC have for years used a "clearance" procedure to determine in advance which agency will investigate a matter. It is our understanding, both through the clearance process and subsequent discussions with the FTC staff, that the FTC has been conducting an investigation that has looked at the facts and circumstances surrounding the NFL-ESPN agreement. Based on our review, we concluded that the facts did not warrant our inquiry into competitive issues beyond those under consideration by the FTC.

I hope that this letter is responsive to the questions that you raised at the Subcommittee's March 31 hearings. Your interest in this matter and in the enforcement of the antitrust laws is sincerely appreciated.

Sincerely,

Charles F. Rule
Assistant Attorney General

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